This electronic thesis or dissertation has been downloaded from the King's Research Portal at https://kclpure.kcl.ac.uk/portal/

Intent in EU Competition Law
The Judical Assessment of Anti-Competitive Strategies

Costa-Cabral, Francisco

Awarding institution:
King's College London

The copyright of this thesis rests with the author and no quotation from it or information derived from it may be published without proper acknowledgement.

END USER LICENCE AGREEMENT

Unless another licence is stated on the immediately following page this work is licensed

under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International

licence. https://creativecommons.org/licenses/by-nc-nd/4.0/

You are free to copy, distribute and transmit the work

Under the following conditions:

- Attribution: You must attribute the work in the manner specified by the author (but not in any way that suggests that they endorse you or your use of the work).
- Non Commercial: You may not use this work for commercial purposes.
- No Derivative Works - You may not alter, transform, or build upon this work.

Any of these conditions can be waived if you receive permission from the author. Your fair dealings and other rights are in no way affected by the above.

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

Download date: 06. May. 2023

INTENT IN EU COMPETITION LAW:

THE JUDICIAL ASSESSMENT OF ANTI-COMPETITIVE STRATEGIES

Francisco Costa-Cabral

Submitted for the degree of

Doctor of Philosophy in Laws

This thesis represents the state of the law on July 2014.

The copyright of this thesis rests with the author and no quotation from it or information derived from it may be published without proper acknowledgement.

This thesis benefited from funding provided by FCT

'Fundação para a Ciência e Tecnologia'

Financed by POPH – QREN – Type 4.1 – Advanced Training

Abstract

This research will investigate whether intent plays a role in the application of Articles 101 and 102 TFEU and, if so, whether such role is subordinate to effects or has an autonomous normative character.

The methodology for answering this question will start by defining intent under EU competition law. It will be argued that actions by undertakings are interpreted as those of rational agents. This will show that the notion of 'subjective intent' and its separation from objective behaviour are misguided. The role of intent will then be analysed with reference to EU competition law goals. Insofar as those goals are understood as purely consequentialist, namely promoting or preventing certain effects, intent can only be used as a proxy for such effects. However, EU competition law will be shown to also apply non-consequentialist moral judgments. Such judgments are the source of the autonomous normative value of intent.

That autonomous normative value will then be described with reference to the case law, namely the notions behind the different forms of collusion, restriction of competition, and abuse of dominance. It will be seen that the normative root of anti-competitive behaviour is based on intent, insofar as collusion and abuse represent intent which is potentially offensive to EU competition law principles. Infringements of Articles 101 and 102 further require the application of intent or effects-based tests, represented in the alternative between restrictions by object or effect and in the different types of abuse. Thus, it will be discussed how the doctrinal emphasis on effects has failed to explain significant sections of the case law.

It will be concluded that the use of intent is indicative of the normative character of EU competition law, namely a stable judicial system based on principles which conciliates moral intuitions with the paradigms of perfect competition.

Table of Contents

Acknowledgments

The contributions of the following people to this thesis were appreciated by the author in a way which far exceeds the worth of the final result.

I would first thank my supervisors for all their comments and support. My first supervisor, Dr Christopher Townley, gave me precious methodological guidance and chapter reviews. His advice of starting with the most difficult part proved to be the most important one for my research. My second supervisor, Professor Emeritus Richard Whish QC, raised my spirits and had his wisdom weigh in at crucial stages. I would never have started this thesis were it not for the wonderful time I had working as teaching assistant in his course at the College of Europe.

I do not know how I could have finished this thesis without the invaluable support and ever-present friendship of Dr Orla Lynskey. At every stage I benefited from her sage advice and her sharp criticism. These acknowledgements are not enough to thank her.

I also give thanks for the enlightening discussions I had with Dr Pablo Ibáñez Colomo. It is always a pleasure to talk about competition law with him, only surpassed by that of his prized friendship.

I must thank in particular the generous availability and insightful comments of my examiners, Professor Giorgio Monti and Professor Ioannis Lianos. They have provided thoughts and inspiration which go beyond what I could pin down in this thesis.

A large part of the benefit from my examiners' comments is thanks to Professor Alison Jones, who (in addition to having participated in my MPhil upgrade) graciously helped me prepare for the exam together with Professor Emeritus Richard Whish.

I would also thank Dr Pinar Akman for kindly granting access to her article (indicated in the bibliography) in advance to its publication.

In retrospect, it seems that I have repaid the fantastic contributions of all these people by criticising them one way or another in the thesis. It goes without saying that this was only a measure of the respect and admiration I have for their work.

I must of course thank my dear family for giving me the support which makes everything in my life possible. I also thank my dear friends for making it such a good life. I must single out Robin Payne for, in addition to his friendship, also revising the language on many chapters of the thesis.

One is confronted with one's own glaring limitations when writing a thesis. Ideas which are clear in the mind's eye show up mangled in paper, and the best research attempts never seem to move beyond a novice effort. This thesis is the result of a trial-and-error procedure where many errors still remain, errors which owe nothing to the above mentioned people and everything to author. That trial-and-error continues though, and those studying competition know that this is the only way to a good result.

INTRODUCTION

> 'A plan is a real thing, and things projected are experienced. A plan once made and visualized becomes reality along with other realities – never to be destroyed but easily to be attacked.'
>
> *The Pearl*

In the novel *The Pearl*, Steinbeck tells of how a poor diver named Kino finds a magnificent pearl. Kino plans to sell the pearl and bring his family out of poverty, but events conspire against him. The above quote describes how Kino formulates his intention, and presages how fate ends up judging such intention. In doing so, Steinbeck conveys how natural and significant the act of planning is. This research will be dedicated to how the same act of planning, when made by undertakings, is judged under European Union ('EU') competition law. The comparison is not as far-fetched as it might sound. The present research will set out to prove two main points. The first point is that understanding an undertaking's intent is just as easy as understanding that of a person, like the one Kino portrays. In the novel we are privy to Kino's thoughts, and the major methodological objection to interpreting an undertaking's intent is that we would require similar access. This would either be impossible or overly dependent on evidence like internal documentation. However, the other characters in the novel also understand Kino: they know he is poor, they anticipate he wants to sell the pearl, and they comprehend his action when he tries to do so. They rely upon the assumption that Kino is rational, and the same happens with undertakings: their actions are rationally interpreted in relation to the beliefs and desires attributed to them. This is how people make sense of each other, in novels and in reality, and there is no reason to deviate from this method for undertakings. In fact, when trying to sell the pearl, Kino would be legally acting like an undertaking.

Understanding the intent of undertakings is instrumental to the second main point of this research: undertakings' actions can be, and often are, judged on this intent. Steinbeck warns at the beginning of *The Pearl* that, being a tale, there are only 'black and white things and good and evil things and nothing in between'. Not only are Kino's actions

judged, but also those of every other character. After finding the pearl, Kino tries to sell it in the village market, which Steinbeck described as follows:

> 'It was supposed that the pearl buyers were individuals acting alone, bidding against one another for the pearls the fishermen brought in. And once it had been so. But this was a wasteful method, for often, in the excitement of bidding for a fine pearl, too great a price had been paid to the fishermen. This was extravagant and not to be countenanced. Now there was only one pearl buyer with many hands, and the men who sat in their offices and waited for Kino knew what price they would offer, how high they would bid, and what method each one would use'.

Kino refuses to sell the pearl at the insignificant price offered by the village market, leaving with his family to the city and setting off tragic events. The pearl buyers are therefore placed on the 'black' side of the tale. This goes beyond their unwitting contribution to the chain of events, and has everything to do with how they intentionally run the village market. Like any tale, *The Pearl* taps into the reader's convictions, and Steinbeck assumes that readers will find the village market unjust. This is just an example of how competition is not morally neutral: market actions are judged according to a sense of justice. That sense of justice is just as present in reading *The Pearl* as it is in dealing with a real case of a cartel that exchanges information and fixes prices. This research will focus upon how these moral judgments are part of the judicial application of EU competition law: how they are influenced by intuitions, how their principles are incorporated in judicial reasoning, and how they ultimately contribute to the stability of the law. Real cases do not always fall in the 'black and white' territory of tales. However, the human capacity for a sense of justice has evolved and exists for real life purposes. Rawls warns not to underestimate our sense of justice, pointing to 'the potentially infinite number and variety of judgments we are prepared to make'.[1] This research covers one of those varieties: moral judgements of competitive activity.

The present research question can therefore be framed as the role in the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union ('Articles 101 and 102').[2] This addresses an oversight of the established view in the doctrine, which considers that those provisions are only concerned about the effects of undertakings' actions. For example, Jones and Sufrin comment that EU competition law 'is essentially an "effects-based" law'.[3] Such an 'effects-based approach' admits that

[1] Rawls (1999) 41.
[2] References to Articles in the Treaty on the Functioning of the European Union will be mentioned only by their number, as well as references to Articles in previous versions of the Treaties when, like Articles 101 and 102, they have not been subject to significant substantive changes.
[3] Jones and Sufrin (2014) 56.

intent can be used to establish collusion under Article 101, to predict or interpret the production of effects, and to apply an adequate sanction. Nevertheless, judging behaviour as anti-competitive would be reserved to effects. Even if actual effects are not directly demanded, behaviour would be judged based on likely effects. While acknowledging the substantive importance of effects, this research will argue that intent plays more than a subordinate role to them. As will be shown, a substantive finding of anti-competitive behaviour starts with judgment of intent, with the possibility of effects being considered at a later stage.

There are good reasons why a substantive role of intent has so far escaped doctrinal attention, namely the importance attributed by authors to economic reasoning and their debate over the goals of EU competition law. Both can be said to be influenced by the 'Chicago School' doctrine in United States ('US') antitrust.[4] Thus, Bork inquired:

> 'What is the point of the law – what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules'.[5]

The answer to these questions, according to Bork, places particular emphasis on judicial adjudication and requires the judiciary to adopt methods which 'approach the rigor of the descriptive models of basic economic theory'.[6] As a result of this economic reasoning, different goals are seen as trade-offs between outcomes: more or less consumer welfare, small or 'fair' undertakings' welfare, market concentration, media plurality, and so on.[7] Even those that disagree with Bork's conclusion that consumer welfare should be the sole goal have accepted this framework.[8] In the US, the debate rages on whether consumer welfare should be considered *strictu sensu* or as total welfare.[9] In the EU, the goals of market integration and consumer welfare are generally recognised, with controversy over how much these incorporate or should also allow for the consideration of goals such as strict efficiency, the competitive process in itself,

[4] See Jones and Sufrin (2014) 22-30. The precise boundaries of Chicago School and other US doctrinal currents are not relevant for the present research. What is important is the emphasis on economic analysis and the debate over goals, demonstrated by the fact that these were the two points addressed by Bork (1993) 426 in the epilogue to the second edition of the seminal *The Antitrust Paradox*. See also the description of the Chicago School by Odudu (2010) 601, focusing on goals and micro economics.
[5] Bork (1993) 50.
[6] Bork (1993) 72.
[7] See Bork (1993) 79.
[8] For example, Monti (2007) 3 argues for a plurality of goals and Townley (2009) 1 defends the consideration of public policy, both starting their arguments by quoting the above passage from Bork.
[9] See Blair and Sokol (2012) 47.

favouring small and medium enterprises, or public policy concerns like the environment or employment.[10] There is agreement across the board, however, that the debate should be based around economically projected outcomes. Solving the 'uncertainty concerning what competition is' would therefore depend on settling the debate on goals, as Odudu states, thereby avoiding the current state of the law where '[p]ractices with similar economic consequences seem to receive dissimilar treatment'.[11]

In this perspective, it is easy to see why the doctrine has overlooked the role of intent: when similar economic consequences are treated dissimilarly, it is diagnosed as a mismatch of goals. Such discrepancies, of course, are not always due to intent. To the extent that actual incoherence in the application of the law was ironed out, the approach marrying goals and effects has been beneficial. Like in the US, this approach has revealed that competition law is a powerful instrument to achieve positive societal outcomes, and ignited a healthy debate on what those should be. It has further highlighted the consequences of enforcement and pushed administrative authorities towards principled, reasoned and transparent policies. Nonetheless, it is submitted that this approach has shown its limits in the EU. The success that it has had as a driver for the 'modernisation' of the European Commission ('Commission') has not been replicated as a device for interpreting the case law of the Court of Justice of the EU ('Court'). As will be developed throughout this research, similar economic consequences – which should therefore raise no conflict of goals – continue to be treated dissimilarly. For example, the case law of the Court prompts the following questions (which can be sketched out leaving the corresponding judgments for more detailed treatment below), based on the similarity of the effects involved:

- Why is market sharing allowed within the structure of a non-dominant undertaking, but not across a network of distributors?
- Why is privately communicating a price to a competitor prohibited, but publicly announcing it allowed?
- Why are cartels prohibited and oligopolies allowed, when both lead to the same market consequences?
- Why are price-fixing agreements which cannot produce effects prohibited, but unsuccessful attempts at price-leading allowed?
- Why are purchasing cooperatives allowed, but not buyer-side cartels?

[10] See Jones and Sufrin (2014) 38-52.
[11] Odudu (2006) 3.

- Why can inefficient undertakings be priced out of the market, but not boycotted out of the market?
- Why is a dominant undertaking prohibited from certain actions when it does not use its market power and therefore, in that regard, it is equal to other undertakings?
- Why is the acquisition of productive infrastructure from another undertaking subject to merger control, but not market acquisition or internal development?
- Why are dominant undertakings prohibited from refusing to supply competitors that are existing customers, but not *ex novo* customers?
- Why are dominant undertakings prohibited from excluding inefficient competitors through below-cost prices, but not through above-cost prices?
- Why can an undertaking refuse to market a product in a given Member State, but not refuse to supply distributors there in order to prevent parallel trade?

As will also be seen, the established view in the doctrine that anti-competitive behaviour depends on effects can only provide the following two answers: either the situation concerns a 'jurisdictional' condition of Articles 101 and 102, separated from a substantive assessment, or the situation is tainted by 'formalism', whereby an undue presumption of effects is applied. It is argued that these answers are unsatisfactory. The first implies that the Court casts its net randomly, by establishing arbitrary distinctions in the scope of Articles 101 and 102. The second asserts that the Court does not know what it is fishing for, by consistently enforcing flawed presumptions. A goal-orientated approach would recognise that, 'jurisdictional' or 'formal' as they may be, those situations are not treated equally according to their economic consequences and should therefore be corrected accordingly. Yet, these situations remain present and visible in the case law of the Court. This research will hold that such situations are not exceptions to be corrected, but interpretations to be understood. As such, the present research will be mostly descriptive, showing how judgments of intent run across the different conditions of Articles 101 and 102. There is no normative claim that this is preferable to judgments of effects, which run in parallel and explain other questions of EU competition law, beyond the assertion that the continued role attributed to intent – in particular when faced with such doctrinal hostility – is necessary for the coherence and stability of the case law.

Scope, methodology and outline

Due to the present research attempting a horizontal analysis of the role of intent in EU competition law, it is necessary to make some limitations purely in order for its scope to fit within administrable research limits. These limitations are expressed in the research sub-title of 'the judicial assessment of anti-competitive strategies'. The first one, related to a judicial assessment, means that the research will focus upon the most significant case law of the Court on the interpretation and application of Articles 101 and 102 as of July 2014.[12] The first instance case law of the General Court of the EU ('General Court') will therefore only be analysed insofar as it may contribute to the interpretation of the case law of the Court, otherwise being considered as yet-unconfirmed statements of the law.[13] For the same reasons, the case law of courts of Member States will not be analysed. The decisional practice of the Commission will also not be analysed, despite its central importance for the practical application of Articles 101 and 102, since it represents no authoritative statement of the law. However, the contrast between the administrative and judicial assessments of anti-competitive strategies is relevant to the present research. Due to the already mentioned research limitations, this administrative assessment will be described with reference to Commission policy statements whenever relevant for the analysis of the case law.

Secondly, this research will not consider the role of intent in all of the requisite conditions for the application of Articles 101 and 102. In particular, market definition and the condition of affecting trade between Member States will not be analysed due to their eminently objective character.[14] Additionally, the conditions for public and private enforcement of those provisions will not be considered. In this regard, it must be underlined that the present research does not cover the so-called 'sanctioning question' governing the conditions for the attribution of liability for the infringement of Articles 101 and 102 to concrete legal or natural persons. Notably, the reference in Article 23(1) and (2) of Regulation 1/2003 to fining undertakings that commit infringements

[12] See, in particular, the case law under Articles 263 and 266.

[13] See Article 256. Although the absence of an appeal of General Court judgments may preclude further challenges to the act, no point on the interpretation of Articles 101 and 102 is ever precluded from being brought before the Court on another occasion.

[14] Although, as the present research against a separation between 'jurisdictional' and substantive conditions, it is possible that the condition of affecting trade between Member States is influenced or influences the finding of restrictions of competition or abuses of dominance involving market integration, a question which this research will not be able to develop.

'intentionally or negligently' belongs to such 'sanctioning question'.[15] This research will only address the main substantive conditions for an infringement derived from the letter of Articles 101 and 102. The difference between these substantive conditions and the 'sanctioning question' can be exemplified by the fact that, as will be seen in Chapter I (on the concept of intent), it is irrelevant for the substantive infringement whether the undertaking had knowledge of illegality but such knowledge might influence whether the infringement is qualified as intentional or negligent. Thus it is possible to find a substantive infringement based on intent, but subsequently find that such infringement was committed negligently or even exempt it from fines based on legitimate expectations.[16] To what extent the intent required for a substantive infringement is related to that required for sanctioning is an issue which research limitations prevent from analysing further.[17]

The scope of the present research will also be affected by methodological concerns stemming from the reference to authors and theory outside EU competition law, namely national law, legal theory, moral philosophy and psychology. These references must be limited to their usefulness for analysing the case law. Those domains are just as prone to controversy, and it is not intended to propose solutions nor make the claims of the present research dependent on such solutions. Therefore, only basic and relatively consensual positions will be referenced. When the case law might reflect an underlying debate, an attempt will be made to mention several perspectives on this debate. This is particularly the case for moral philosophy, which as mentioned below has long engaged in the debate on whether behaviour should be judged according to its intention or effects. This research will provide the same basic detail that moral philosophy provides when using legal examples. What will be considered important is that these references outside EU competition law can be easily and intuitively grasped, as this represents their best contribution to reading the case law. The purpose is neither to attempt a 'realist' analysis of psychological judicial decision-making, namely how the intuitions behind the use of intent represent emotional or unconscious processes. This research is

[15] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1 4.1.2003 p.1 ('Regulation 1/2003').
[16] See Case 27/76 *United Brands* [1978] ECR 207 298-301 and Case C-681/11 *Schenker* [2013] ECR nyr 40-41.
[17] A discrepancy would explain why the concept of intent in EU competition law does not coincide with national criminal law, as analysed in Chapter I (on the concept of intent), despite the fact that EU competition law sanctions can be classified as criminal under the European Convention on Human Rights, see Jones and Sufrin (2014) 934-938. There is no necessary link between a type of intent and criminal sanctions, as even national criminal law may adopt strict liability, see Ashworth (2009) 160-170.

only concerned with the interpretation of Articles 101 and 102 as expressed and reasoned in accepted legal forms.

The present research can be outlined as follows. The first two chapters will set out the theoretical framework to be applied. **Chapter I** will define the concept of intent as the interpretation of an undertaking's behaviour as that of a rational agent. This is necessary to understand the instances, outlined here and developed in subsequent chapters, where intent is given legal relevance. **Chapter II** will consider how intent is judged, separating the subordination to effects from the normative value attributed to intent under the principles of EU competition law. This chapter will be mostly descriptive, as judgments broader than consequentialism will be shown to exist, but will also introduce the normative claim of this research: that such broad judgments, based on intent, are essential for the stability of EU competition law. The next chapters will then apply this theoretical framework to three main substantive conditions of Articles 101 and 102, developing the descriptive claim that intent can be used to better explain the case law than effects. **Chapter III** will describe how the notion of collusion under Article 101 represents influence over independent economic action. This shows how infringements of Article 101 are fundamentally based on a negative judgement of the intent to exercise such influence. **Chapter IV** will analyse the notion of restriction of competition under Article 101, being mainly dedicated to demonstrating that restrictions by object are moral judgment of intent in its context. Therefore, to the intent necessary for finding collusion must be added the effects captured in restrictions by effect or the intent corresponding to the different negative judgments of restrictions by object. **Chapter V** will describe how the notion of abuse of dominance joins these two steps, starting from intent which is considered different from normal competition and then applying tests of intent or effects under specific abuses. The **Conclusion** will highlight the non-consequentialist character of EU competition law, and return to the normative claim that the use of intent is necessary to preserve this character.

CHAPTER I

The concept of intent

This chapter will define 'intent', for the purposes of EU competition law, as 'an undertaking's legally relevant decision to act on its beliefs and desires'. 'Intent' and 'intention' are not usually distinguished, but will be so in the present research. Intent will be treated as a legal concept, intention as an interpretative one. Intention is classically understood as answering the question 'why?' by giving a reason for a certain action.[18] Intention will be defined as 'a decision to act on beliefs and desires' which, as can be seen, differs from the definition of intent by omitting the reference to legal relevance. Under this logic, intent could be defined as 'an undertaking's legally relevant intention'. This means that if an intention is legally irrelevant under Articles 101 and 102 there is no intent. Because of this, intent is only defined in relation to undertakings (as the only legally relevant agents in EU competition law). Moreover, because of its legal nature, intent requires evidence to the requisite legal standard, an issue treated below in some detail. Nevertheless, before questions of legal relevance are treated it is first necessary to interpret what is that undertakings intend, the mentioned 'decision to act on beliefs and desires'. This definition represents the application of the 'intentional stance', which interprets actions as if the agent was motivated by beliefs and desires.[19] It is empirically-confirmed that such interpretation is the way people make sense of everyday behaviour.[20] This chapter will take the fact that the 'intentional stance' is applied to rational agents to argue that it can also be applied to undertakings.

As will be seen in this chapter, many of the misgivings about intent in EU competition law are due to mixing the interpretation of intention, the situations where intention becomes legally relevant, and the evidence required for this. These misgivings are reflected in the doctrinal qualification of 'subjective intent' or 'objective intent' (or intention, since authors do not distinguish between intention and intent).[21] As this

[18] See Anscombe (1963) 9.
[19] See Dennet (2009) 1.
[20] See Malle and Knobe (1997) 102.
[21] Some authors use the dichotomy of 'objective' and 'subjective', see Akman (2013) 4, Bavasso (2005) 620, Melícias (2010) 571 and Nazzini (2011) 58, while others just use the qualification of 'subjective', see Bailey (2012) 578, Eilmansberger (2005) 148, Ibáñez Colomo (2012) 548, Odudu (2001) 64 and Whish and Bailey (2012) 119.

chapter will show, such qualifications are best avoided. Although intention is undoubtedly 'subjective', this qualification is further assumed by authors to mean that intention is defined and exhausted in a 'state of mind'. However, as mentioned, intention results from the 'objective' interpretation of an action under the 'intentional stance' as that of a rational agent. This interpretation naturally incorporates accounts of a 'state of mind', which must be coherent with the action or else be discarded. As such, there can be no 'subjective' intention relying solely on a 'state of mind' and its accounts. The qualifications of 'subjective' and 'objective' intention are misleading, since 'subjective' is implied in intention and 'objective' in the interpretation.

Furthermore, in what concerns the legal relevance of intention, it will be seen that it must be implemented in order to fall within the scope of Articles 101 and 102. Those provisions do not prohibit decisions to act that are not carried through to a significant degree. Intent must always manifest itself in some 'objective' way, namely as an agreement or abusive conduct capable of producing effects.[22] Therefore, there if intention is 'subjective', in the sense of non-implemented, it is irrelevant for EU competition law. The distinction between 'objective' and 'subjective' intention could perhaps be useful to differentiate between evidence of the undertakings' behaviour, used to interpret actions objectively, and internal documentation and statements, as accounts of a 'state of mind'. However, this risks being misread as different substantive notions of intent.[23] As discussed below, all evidence goes to the objective interpretation of the action, including internal documentation and statements. Thus, the Court has stated that internal documentation is also 'objective'.[24] Furthermore, it will also be described below how the qualification of 'subjective' is used to signal beliefs and desires which are not legally relevant.[25] Therefore, it is preferable to refer to external and internal evidence instead of 'objective' and 'subjective' intention.

This chapter will discuss how the case law has precluded such a clear definition of intent. First, the Court has resorted to a multitude of subjective terms without clarifying their meaning, such as 'common intent', 'aims', 'purpose', 'intention', 'objectives', 'subjective intention', 'object' (differently from the letter of Article 101), 'business

[22] All the forms of collusion stated in Article 101 will be referred to as 'agreement' in this chapter.
[23] See Nazzini (2011) 58.
[24] See Case C-202/07 P *France Télécom* [2009] ECR I-2369 96.
[25] See Case C-209/07 *BIDS* [2008] ECR I-8637 21.

strategy', 'motives', 'intent', 'economic objective' and 'plan'.[26] Second, the Court has made contradictory statements about the value of intent, namely stating that 'subjective intention' is irrelevant but then finding a restriction by object by referring multiple times to what was 'intended', or declaring that abuse of dominance is an 'objective concept' but then allowing it to be established based on 'subjective factors'.[27] Third, the Court's rationalisation that intention is not necessary to find an infringement of Articles 101 and 102, but can be 'taken into account', flies in the face of the demands, also formulated by the Court, that the 'objectives' of agreements and the 'business strategy' of dominant undertakings must necessarily be examined.[28] Throughout the present research, and not only in the present chapter, it will be seen that flawed conceptual definition is the main obstacle for the doctrine's analysis of the role of intent. It is all too easy for authors to read the Court's dismissive statements literally, particularly to support calls for an 'effects-based approach' to EU competition law, while at the same time ignoring that intent is being used under its many terminological guises.

The case law is a Gordian knot of multiple expressions and contradictory statements which can only be cut through by a conceptual definition which clearly separates the interpretation of intention from its legal relevance. Only after interpretation and legal relevance have been addressed can the true value of intent under Articles 101 and 102 be dealt with in the corresponding chapters. As such, this chapter will first discuss interpretation: how the application of the 'intentional stance' to undertakings dispenses with a search for their 'state of mind', how economic rationality is used to interpret credible strategies by undertakings, and how the purpose of agreements and abusive conduct reflects undertakings' intention instead of being able to be interpreted independently, as the case law as misguidedly done (**1.**). The chapter will then consider the legal relevance of intention: how the only general condition for such relevance is implementation, assessed as the capability to produce the desired effects, and how any particular decisions, beliefs and desires are legally relevant or irrelevant depending on the application of Articles 101 and 102 (**2.**). Once interpretation and legal relevance are properly dealt with, the evidentiary aspect will fall into place without requiring its own

[26] Cases 29-30/83 *Compagnie Royale Asturienne des Mines* [1984] ECR 1679 26, Cases 96-102, 104-105, 108 and 110/82 *IAZ* [1983] ECR 3369 25, *BIDS* (fn. 25) 21, Case C-549/10 P *Tomra* [2012] ECR nyr 19-20 and *France Télécom* (fn. 24) 109.
[27] *BIDS* (fn. 25) 21 and 31-33 and *Tomra* (fn. 26) 17 and 19.
[28] Case C-501/06 P *Glaxo* [2009] ECR I-9291 58 and *Tomra* (fn. 26) 19-20.

analysis, with the case law that intention is not necessary but can be taken into account ultimately confined to the use of internal evidence.[29]

1. The interpretation of intent

This section will define intent as the object of 'folk psychology', which is used in making sense of people's everyday actions. In general, this everyday interpretation of intention does not differ from the one in a legal context. It will be shown that this is also the case with the interpretation of undertakings' intention in EU competition law. An interpretation based on 'folk psychology' is the most important methodological fact about the use of intent by the case law, trumping statements about the value of intent and the issuing distinctions between 'objective' and 'subjective' intent. A useful starting point for understanding such interpretation is the definition of intentional actions by Anscombe as those that satisfy a certain sense of the question 'why'.[30] Speaks provides three possible senses for Anscombe's question:

> '1. Evidential: "They're serving french fries in the cafeteria." "Why?" "That's what the sign said."
>
> 2. Causal: "And then the lights in the house all went out." "Why?" "We blew a fuse."
>
> 3. Reason-giving: "Suddenly, he left lecture and went back to his office." "Why?" "He needed more coffee."'.[31]

Only in the last sense, of attributing a purpose, will an action be intentional. These examples can be adapted in order to give an idea of how they would apply to the interpretation of intent in EU competition law. Again, only the sense of reason-giving is relevant for determining intent:

[29] Akman (2014) 42, Melícias (2010) 578 and Posner (2001) 214 argue that evidence of intent can be manipulated by legally sophisticated actors, but they presuppose that intent corresponds to a 'state of mind' as expressed by internal documentation. In any event, such documentation is likely to reflect an undertaking's intent despite the best efforts of legal counsel, as indicated by the case law so far and the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying [Article 102] to abusive exclusionary conduct by dominant undertakings 2009/C 45/02 ('Enforcement Guidance on Article 102'). Nazzini (2011) 64 comments that economic data is as easily manipulated, highlighting that the degree of economic sophistication is probably more important in present day competition law.

[30] See Anscombe (1963) 9.

[31] Speaks (2004) 5.

1. Evidential: ‘The cartel members all raised their prices to the same level.’ ‘Why?’ ‘That’s what the members’ internal documentation said they would do.’

2. Causal: ‘The dominant undertaking’s products were offered together.’ ‘Why?’ ‘Its commercial department instructed sellers to do so.’

3. Reason-giving: ‘The dominant undertaking’s products were priced below cost.’ ‘Why?’ ‘It wanted to harm its competitors’.

As noted above, the Court has stated that expressions of intention, such as internal documentation, are not necessary to establish an infringement but can be taken into account. This section will show that the question ‘why?’ could just as well be answered evidentially without resorting to internal documentation, for example ‘the cartel members all met before’. As for a causal answer, the example given conveys that an undertaking’s internal processes are not particularly useful in interpreting its intention, the same way that a person’s intention is hard to describe through neural activity.[32] Therefore, the pretension to capture an undertaking’s ‘state of mind’ as a reflection of an internal process should be set aside. The exercise of reason-giving only requires the interpretation of the undertaking’s action.

Therefore, this section will begin by describing how the expressions used by the Court correspond to ‘folk psychology’, which people use to identify and explain intentional actions in their everyday life – in other words, to answer the question ‘why’ (i). It will then frame this as the application of the ‘intentional stance’, which considers intention as an agent’s decision to act on its beliefs and desires, and confirm that it also extends to undertakings (ii). Next, it will develop how undertakings’ intention is interpreted using economic rationality, namely how their beliefs and desires are attributed and linked into credible strategies (iii). The case law separation between the purpose of agreements and abusive conduct, on the one hand, and the intention of undertakings, on the other, will then be described in order to conclude that such agreements and abusive conduct are intentionally designed by undertakings, and thus cannot be interpreted independently from undertakings’ beliefs and desires (iv). Finally, the reason for the separation in the case law will be traced to the misapplication of legal interpretation to actions by private parties, since the purpose of normative acts can indeed by independent from their public law authors (v).

[32] Dworkin (1998) 50 also distinguishes between ‘purposive’ and ‘causal interpretation’.

i. 'Folk psychology'

When the Court uses subjective expressions such as 'aims', 'intention', 'objectives', etc. with no further definition, it appears to give them the same meaning they have in normal, everyday situations. These so-called 'mentalist' expressions betray the use of 'folk psychology', which is the way people understand, explain and predict the behaviour of other people.[33] People distinguish between intentional and unintentional actions, with pervasive social consequences in relation to helping behaviour, aggression, relationship conflict, and judgments of responsibility, blame or punishment.[34] 'Folk psychology' considers intention in terms of beliefs and desires, notably the desire for an outcome and the appropriate beliefs on how the act would lead to the outcome.[35] The idea that intention is constituted by beliefs and desires has a philosophical pedigree that can be traced to Aristotle, its use ranging from Hume's arguments for putting reason to the service of passion to the hyper-rational formulations of von Neumann and Morgensterns' game-theory.[36] The appeal of 'folk psychology' comes from the inescapable observation that people make sense of each other by simply observing their actions and conjecturing about their intention. With no more knowledge than the one we apparently are all provided with, each member of mankind is able (or at least does put it beyond his or her capabilities) to interpret another's intention.[37] As Dennet describes in relation to observing another person's behaviour, '[s]o natural and effortless are ['folk psychology's'] interpretations that it is almost impossible to supress them'.[38]

It must be underlined that 'folk psychology', namely the interpretation of the intention behind an action in terms of beliefs and desires, is an empirically-proven phenomenon. It has been investigated and tested when children first develop a so-called 'theory of mind', that is to say, when they attribute beliefs and desires.[39] However, the relationship of 'folk psychology' to psychology and other mind sciences is ambiguous. Although it is certain that 'folk psychology' is how people make sense of each other, it is also clear that it is a layman's view which does not apply the scientific method. Hence, the

[33] See Dennet (2009) 1 and Dennet (1989) 7. This section will first focus on the interpretative function of 'folk psychology', addressing its predictive power below.
[34] See Malle and Knobe (1997) 101-102.
[35] Malle and Knobe (1997) 105 advance a three-way model of beliefs, desires and intention (the latter being the decision to act), which fits the 'intentional stance' analysed next.
[36] See Malle and Knobe (1997) 105.
[37] With the exception of the mentally impaired, which are often defined by the incapability to do so.
[38] Dennet (1989) 8.
[39] See Malle and Knobe (1997) 102.

expressions ‘aims’, ‘intention’, ‘objectives’, etc. were qualified above as ‘mentalist’ since they do not actually correspond to how the mind works. This is best explained by the comparison with ‘folk physics’.[40] People have natural expectations about the behaviour of middle-sized objects in a normal environment, which has allowed mankind to keep warm, manipulate objects and avoid injuries for thousands of years without scientific knowledge of physics. However, ‘folk physics’ has trouble anticipating unintuitive phenomena (such as sailing upwind) and relies on simplifications which sometimes are not true (such as the ‘centre of gravity’ of objects). Therefore, ‘folk physics’ and ‘folk psychology’ are useful in showing how certain phenomena are perceived, not how they scientifically work.[41] This is nonetheless usually sufficient – indeed necessary – for everyday life and therefore socially understood and accepted.

‘Folk psychology’ is also employed whenever the law requires an interpretation of intention.[42] Lawyers, judges and juries routinely attribute intentions composed of beliefs and desires without any scientific assistance or special behavioural training. However, intent has a particular importance for criminal law which does not fully correspond to ‘folk psychology’. Because the doctrine and jurisprudence have dedicated much attention to the notion of intent in criminal law, such notion tends to influence other fields of law despite its very particular assumptions. In criminal law, intention is often described as a ‘state of mind’.[43] Criminal law attempts to capture a precise picture of all the occurrences at the time when an offence is committed and, in relation to intention, this is seen as establishing psychological states. In the vast majority of the situations, ‘folk psychology’ proves up to the task by acting in the usual manner of interpreting intention from actions.[44] Nonetheless, criminal law’s objective of capturing an actual ‘state of mind’ overshadows the importance of ‘folk psychology’.

The non-scientific status of ‘folk psychology’ makes it appear as a second-best approach to the standard of proof required in criminal law. It is true that only psychology can provide a scientific description of a ‘state of mind’. Nonetheless, intention in criminal offences is usually described in their everyday meaning in order to benefit from social understanding and acceptation.[45] Therefore, the use of psychological

[40] See Dennet (1989) 7-11.
[41] As such, the scientific interest in ‘folk psychology’ is limited to how perception works, not as a valid explanation of the perceived phenomena.
[42] See Malle and Knobe (1997) 102 and Odudu (2001) 69-70.
[43] See Wilson (2011) 124.
[44] Wilson (2011) 127-129 does not mention ‘folk psychology’ but refers to the natural interpretation of actions and the ‘mentalist’ concepts used in everyday speech.
[45] See Wilson (2011) 126-127.

evidence (such as expert testimony) is exceptional, and even then it must conform to the 'mentalist' framework established by 'folk psychology'. Criminal law may however adopt a technical conception of intention which is at odds with 'folk psychology'. Notably, in some cases intention requires the certainty of a consequence when a high probability suffices for 'folk psychology'.[46] Criminal law also has difficulties in dealing with the 'folk psychology' attribution of intention in the 'double effect' situations discussed in Chapter II (on judging intent).[47] Without the support of 'folk psychology', criminal law is forced to attempt to establish a 'state of mind' instead of simply interpreting an action. Those situations naturally receive a disproportionate amount of doctrinal and jurisprudential attention, but it must however be remembered that they remain exceptional.

A conjunction of circumstances has led to the adoption by certain authors in EU competition law of a radical conception of intent which rejects 'folk psychology'. It begins with the influence of criminal law on US antitrust, where intent is also defined as a 'state of mind'.[48] Thus, Akman, Melícias and Nazzini all refer to US doctrine in asserting that intent corresponds to a 'state of mind'.[49] However, these authors then reject the position of US doctrine that so-called 'objective' intent can be interpreted from the action, as 'folk psychology' typically does, reasoning that if intent is a 'state of mind' it can only be 'subjective'. Melícias and Nazzini argue that interpreting intent from an action, in particular in light of the desire to produce certain effects, is in reality an inquiry into those effects.[50] Akman goes further, and declares that 'if external factors are used merely to interpret the conduct of the undertaking, this in itself would not be an intent inquiry'.[51] For these authors, only internal documentation can reveal an undertaking's 'state of mind'.[52] This is an attempt to differentiate the interpretation of intent from a substantive test of anti-competitive effects which, as discussed below, has some merit. Nonetheless, as an epistemological claim that intent cannot be interpreted from actions, it is patently false.[53] It is disproved by the everyday application of 'folk psychology' and its legal application by criminal law, by US antitrust and, as developed

[46] See Wilson (2011) 131-133.
[47] See Wilson (2011) 130-131.
[48] See Stucke (2012) 809. Bavasso (2005) 24 notes that definitions of intent as a 'state of mind' come from criminal law, while economists have no problems with assessing intent from market actions.
[49] Akman (2014) 4 fn. 7, Melícias (2010) 571 and Nazzini (58) fn. 19.
[50] Melícias (2010) 570-571 and Nazzini (2011) 58.
[51] Akman (2014) 5.
[52] Although Nazzini (2011) 58 adds the capability to produce effects, as discussed below.
[53] The issue of incorporating first-person accounts in this interpretation, and the mistake of interpreting the desire for a certain outcome from the action and not the other way around, are discussed below.

next, by EU competition law. It is worth quoting Anscombe's position in relation to interpreting intention from an internal 'state of mind' as opposed to interpreting it from actions:

> '[we may] think that if we want to know a man's intentions it is into the contents of his mind, and only into these, that we must enquire; and hence, that if we wish to understand what intention is, we must be investigating something whose existence is purely in the sphere of the mind; and that although intention issues in actions, and the way this happens also presents interesting questions, still what physically takes place, i.e. what a man actually does, is the very last thing we need consider in our enquiry. Whereas I wish to say that it is the first'.[54]

ii. Applying the 'intentional stance' to undertakings

It is a well observed phenomenon that folk psychology' is not limited to people: a 'theory of mind' is also often applied to animals and inanimate objects, that is to say, they are attributed beliefs and desires. In other words, one may say that a dog wants a bone, or that a computer knows that it is turned on. There are two ways to consider this. The first is that these are just metaphors, since animals and objects do not possess the human capability to have beliefs and desires.[55] The second is that, whether or not people are involved, 'folk psychology' applies an interpretative strategy called the 'intentional stance'. According to Dennet, the 'intentional stance' consists in 'interpreting the behaviour of an entity (person, animal, artifact, whatever) by treating it as if it were a rational agent who governed its choice of action by a consideration of its beliefs and desires'.[56] This is contrasted with other interpretative strategies, the 'physical stance' and the 'design stance'. The 'physical stance' is used to interpret and predict behaviour according to physical sciences, for example the manipulation of inanimate objects.[57] Resorting to physical sciences can however be bypassed by applying the 'design stance': instead of investigating how a machine works, for example, one can simply assume 'that an entity is designed as I suppose it to be, and that it will operate according

[54] Anscombe (1963) 9.
[55] This is without prejudice that some animals might have that capacity.
[56] Dennet (2009) 1, using scare quotes for several of these expressions (choice, action, consideration, beliefs and desire) in order to signify that they might not have their standard connotations.
[57] Because Dennet (2009) 2 appeals to science, this is not the same as 'folk physics' previously described.

to that design'.[58] The relevant question for EU competition law purposes is whether any of these interpretative strategies applies to undertakings.

It will be argued that the 'intentional stance' applies to an undertaking insofar as it is treated as an agent 'with beliefs and desires and enough rationality to do what it ought to do given those beliefs and desires'.[59] The advantages of the 'intentional stance' have been exemplified by Dennet with computer chess programs: the 'physical stance' could be used for their electronic functioning, or the 'design stance' for their lines of code, but it is much easier to interpret the moves of a computer chess program by treating it as a rational agent who knows how to play and wants to win.[60] The 'intentional stance' has been recognised to apply to natural and legal persons, which under the case law can constitute undertakings if engaged in economic activity.[61] Therefore, it is a small step to apply the 'intentional stance' also to undertakings. This does not preclude the application of the 'design stance': insofar as undertakings are defined in relation to the exercise of economic activity, they can be said to be 'designed' for this purpose.[62] As such, the 'design stance' can be applied to exclude non-economic acts, like *ultra vires* acts can be struck down in company law, without pondering any beliefs or desires. The 'design stance' is also instrumental in the analysis of effects of practices, as commented below. Nonetheless, when the focus is on the undertaking's actions, the finer interpretation of the 'intentional stance' is required.

That the 'intentional stance' applies to undertakings can be confirmed by looking at its defining characteristic: it abstracts from how agents arrive at their decisions. Dennet describes that the 'intentional stance' 'is not directly a theory of the internal mechanisms that accomplish the roughly rational guidance thereby predicted'.[63] As such, it does not require a psychological or neural analysis when applied to people, the same way it dismisses a corporate law or managerial analysis when applied to companies. It simply assumes that the decisions of both natural and legal persons will be an expression of their rationally. Undertakings are defined in relation to their economic activity, regardless of their legal character, in order to achieve the abstraction provided by the 'intentional stance'. Therefore, once several entities are integrated under an undertaking, their internal relationships are irrelevant for interpreting that

[58] Dennet (2009) 2-3. See also Dennet (1989) 16-17.
[59] Dennet (2009) 3.
[60] Dennet (2009) 3-4.
[61] See Jones and Sufrin (2014) 128.
[62] See Clark (1994) 405.
[63] Dennet (2009) 20.

undertaking's behaviour (although they might be relevant, as noted above, for subsequently sanctioning each of these entities).

The abstraction provided by the 'intentional stance' dispenses with the notion of intention as a literal 'state of mind'. Akman, misled by this notion, comments that:

> 'in the case of undertakings which have no thoughts of their own but have agents acting on their behalf, one would have to decide on a case-by-case basis whose intent is the relevant intent. This would not be in line with the principle of legal certainty as the undertakings would not be able to know in advance whose expressions of intent will be considered to be the intent of the undertaking unless this was specifically regulated *ex ante'*.[64]

Contrary to what Akman argues, the problem of 'whose intent is the relevant intent' does not need specific regulation because it is dealt with interpretively.[65] Since agents are acting on behalf of the undertaking and are therefore part of it, they are as relevant as the neurons from which a person's intention originates. Despite positing that undertakings have 'no thoughts of their own', Akman also ends up by applying the 'intentional stance' when inquiring how undertakings would 'be able to know'. As an interpretative strategy, the application of the 'intentional stance' depends on its success, that is to say, whether something is 'usefully and voluminously predictable' by using it.[66] As will be seen next, treating undertakings as rational agents engaged in economic activity is, to all indications, the default position of case law and the doctrine.

Through the 'intentional stance', an undertaking's intention (as that of any other agent) can be defined as the 'decision to act on its beliefs and desires'. The attribution beliefs and desires take place naturally once the relevant parameters for undertakings are internalised. Although this attribution can be said to follow some rules, these should not be seen as strict theory but as practical reasoning. In relation to beliefs, Dennet comments that exposure is normally the sufficient condition for knowing about something.[67] If necessary, beliefs can be narrowed down by the rule which attributes 'all the truths relevant to the [agent's] interests (or desires) that [its] experience to date has made available'.[68] As such, it is not difficult to attribute most beliefs related to an

[64] Akman (2014) 40-41, addressing the argument by Odudu (2001) 70 fn. 60 that the fact that companies have 'no subjective thoughts' recommends the interpretation of their actions.
[65] This is different from the distribution of punishment between the legal and natural persons constituting the undertaking, which is part of the 'sanctioning question'.
[66] Dennet (2009) 1.
[67] Dennet (1989) 18, adding that the condition of 'normally' is not as demanding as it seems since people do not easily accept abnormal ignorance, exemplifying with the sceptical reception of the claim that someone did not know a gun was loaded after being observed loading it.
[68] See Dennet (1989) 18.

undertaking's economic activity, in particular those relevant to the markets on which it is active, such as its productive infrastructure, consumer preferences and competing offers. In *TeliaSonera* the Court stated that, as a rule, an undertaking knows its own costs but not those of its competitors, which can only be explained by not being exposed to the internal information of competitors.[69]

In essence, undertakings are attributed the beliefs they 'ought to have', and the same holds true for desires.[70] If necessary, desires can also be narrowed down by Dennet's rule of attributing 'desires for those things [an agent] believes to be good for it'.[71] Undertakings are not defined in relation to making a profit, but it is generally assumed that they are interested in exercising (and continuing to exercise) their economic activity.[72] Desires to cover costs, to sell production and to have a favourable competitive position can therefore also be attributed with no difficulty. This provides a framework for interpreting the bulk of the market behaviour, in particular that which reacts to consumer demand and competitive conditions. Thus, in *T-Mobile,* the Court referred to the presumption that undertakings will take advantage of the information exchanged with their competitors, which equates to attributing the corresponding desire not to suffer a competitive disadvantage.[73]

iii. Strategies

The present research, as stated in its Introduction, will focus on anti-competitive strategies, which highlight the role of (economic) rationality in the application of the 'intentional stance' to undertakings. Dennet formulates a rule promoting an interplay between beliefs and desires which attributes 'desires for those things [an agent] believes to be the best means to other ends it desires'.[74] The reference to means and ends is

[69] Case C-52/09 *TeliaSonera* [2011] ECR I-527 44.
[70] See Dennet (1989) 20. Dworkin (2011) 50-51 accepts that people act by desires, but differentiates them from other things which are 'good' for them in the ethical sense. In both cases it is rationality which allows stating that people act for 'reasons'.
[71] Dennet (1989) 20.
[72] Dennet (1989) 20 also refers to the attribution such basic desires, like self-preservation, which 'typically terminates the "Why" game of reason giving'. This would also serve to distinguish the 'ends' from the 'means' stated below in relation to strategies.
[73] Case C-8/08 *T-Mobile* [2009] ECR I-4529 44. The fact that an agreement does not have to reflect the commercial interest of its participants, as the Court stated in Cases C-403 and 405/04 P *Sumitomo* [2007] ECR I-729 346, does not mean that there is no such desire. As discussed in Chapter III (on collusion), the defining characteristic of an 'agreement' under Article 101 is an undertaking acting on another's desire.
[74] Dennet (1989) 20.

indicative of a plan or strategy, expressions which, as remarked above, the Court has employed in relation to intention. The notion of 'strategy' will as such be used in relation to a particular type of intent which links means to ends, either within the same decision or across several decisions.[75] Interpreting a strategy requires employing rationality to assess these connections.

The essence of the 'intentional stance' is to treat agents as rational. Considering that undertakings are defined in relation to their economic activity, this naturally involves the consideration of economic rationality. Some anti-competitive strategies may only be understood in light of economic rationality, not conventional rationality, for example the usefulness of below-cost pricing for harming competitors. This may require the use of economic science, the same way that criminal law resorts to psychology in order to establish some states of mind. However, it should be remembered that economic rationality is a variety of the rationality used in everyday 'folk psychology'.[76] As Dennet states, '[o]ne starts with the ideal of perfect rationality and revises downwards as circumstances dictate'.[77] Therefore, the use lower 'folk psychology' in relation to the intention of undertakings is not precluded, since what is important is to interpret the decision and not assess its perfect economic rationality.[78]

It is generally recognised that economic rationality applies to the interpretation of strategies in EU competition law, but this is sometimes mixed with a finding that such strategies are anti-competitive. Under Article 102, it has been considered whether to apply a 'profit sacrifice test' or a 'no economic sense test' to finding an abuse of dominance.[79] The 'profit sacrifice test' starts by attributing the desire not to sacrifice profits, and attempts to rationally deduct if the decision to incur such a sacrifice is intended to exclude competition. The 'no economic sense test' asks whether any decision, profit sacrificing or not, can only be rationally explained by the intent to exclude competition. These tests have been criticised as overly broad, since they capture

[75] A 'single, overall agreements' or abuses of dominance which involve the interaction between the dominant undertaking and several distributors are examples of connected decisions.
[76] As Jones and Sufrin (2014) 6 fn. 28 observe, undertakings cannot always be expected to act rationally. Nevertheless, the internally fragmented decision-making that leads to this turns out to be analogous to the investigations of human decision-making discussed by Dennet (1993) 115-126, where a conscious central decision-maker is an illusion. As 'folk psychology' can deal with human irrationality, so to can it deal with that of undertakings.
[77] Dennet (1989) 21.
[78] This is one of the major differences between intent and effects-based methods, as detailed in Chapter II (on judging intent): while economics should always be relied on when determining effects, this is not the case when interpreting behaviour, since undertakings might act in a manner irrational by economic standards.
[79] See Jones and Sufrin (2014) 381 and O'Donoghue and Padilla (2013) 227-231.

some forms of exclusion that are pro-competitive. Akman criticises more generally that undertakings usually act rationally, and therefore 'an analogy with the "reasonable person" and similar tests […] is not helpful in distinguishing bad intentions from good intentions'.[80] Nevertheless, such tests have been applied by the Court and referred to by the Commission.[81] This shows that they are useful in interpreting certain strategies.[82] It is true that, as Nazzini also notes, the interpretation of intent should not be conflated with finding behaviour anti-competitive.[83] However, this also means that the interpretation of intent cannot be criticised for being overly broad and capturing pro-competitive behaviour, since what matters is the substantive test applied to intent.[84]

The consideration of intent as a strategy to achieve certain outcomes nevertheless straddles the frontier with effects analysis. It is important to note that, as developed in Chapter II (on judging intent), the reasons for finding a strategy anti-competitive may be different from the ones for finding effects, even if the strategy is directed at achieving such effects. Thus, what is decisive is whether behaviour is considered anti-competitive based on intent or effects. That being said, insofar as interpretation is concerned, a credible strategy to reach a certain outcome is similar to an effects analysis. To begin with, they both consider the economic and legal context. Although a strategy is limited to the context which an undertaking knows, as remarked above the majority of relevant market information can be attributed to undertakings (with the exception of competitors' internal information). This explains why restrictions by object and effect under Article 101 both require an analysis of context, as discussed in Chapter IV (on restrictions of competition), even though only restrictions by object are based on intent.

A credible strategy also requires the capability to produce the desired effects, which is often confused with effects analysis. The Court will often refer to effects in its reasoning, and only careful reading will show that it is referring to the purpose of the strategy and not investigating if effects actually take place. For example, in *Consten and Grundig* the Court appears to describe the effects of the agreement when it states that it 'results in the isolation of the French market and makes it possible to charge for the

[80] Akman (2014) 41.
[81] As discussed in Chapter V (on abuse of dominance), Jones and Sufrin (2014) 381 connect the 'profit-sacrifice test' with predatory pricing and the 'no economic sense test' with 'naked abuses' in the Enforcement Guidance on Article 102.
[82] See O'Donoghue and Padilla (2013) 231.
[83] See Nazzini (2011) 58.
[84] As will be seen in Chapter V (on abuse of dominance), these tests are a reflection of a general standard (which they do not exhaust) of considering abusive strategies that intend to directly harm competitors.

products in question prices which are sheltered from all effective competition'.[85] Nonetheless, these considerations prove to be theoretical, since in the following paragraph the Court rejects analysing 'economic data', namely prices differences between Member States.[86] Without such data there is no way of knowing if prices were 'sheltered from all effective competition'.[87] The point of *Consten and Grundig*, as the Court added, was that the agreement 'aims at isolating the French market', not that it led to this effect.[88]

A strategy's capability to produce effects is assessed in light of rational expectation while the analysis of effects is factual. However, the differences might again not be substantial due to the assumptions of market knowledge. As discussed below, the capability to produce effects is the standard for legally relevant implementation, and rarely is it argued that an agreement or abusive conduct did not go according to plan and were incapable of producing effects. It will be argued in Chapter V (on abuse of dominance) that this standard of implementation can lead to confusion when the capability to produce effects is also adopted as the standard for anti-competitive effects under Article 102. Nonetheless, not all strategies capable of producing an effect actually desire to do so or, more importantly, go about it in the same way. The purpose of the interpretation of strategies is precisely to go beyond the capability to produce effects.

Another issue concerns the integration of undertakings' accounts into the interpretation of strategies. Once more, it is rationality which serves as the interpretative criteria. Dennet comments that, on the one hand, language enables the formulation of varied and highly specific desires, but on the other hand, language might also commit oneself to more stringent conditions than if the desires were left unexpressed.[89] The verbalisation of strategies certainly provides a helpful framing device. In this line, Hutto proposes that 'folk psychology' is best viewed as 'narrative practice', with rationality organising events in order to provide the explanation of actions (which might not be available by logical deduction from beliefs and desires).[90] First-person accounts are particularly useful, since 'the authors of actions are uniquely well placed to explain their reasons for themselves'.[91] This explains the importance that internal documentation and statements have acquired in EU competition law. Nonetheless, these must not be considered the

[85] Cases 56 and 58/64 *Consten and Grundig* [1966] ECR 429 343.
[86] *Consten and Grundig* (fn. 85) 343.
[87] See Jones and Sufrin 206.
[88] *Consten and Grundig* (fn. 85) 343.
[89] Dennet (1989) 20.
[90] See Hutto (2009) 2-11.
[91] Hutto (2009) 12.

expression of an undertaking's 'state of mind', as already noted above, but as putting forward possible decisions, beliefs and desires to be checked against undertakings' actions. Hutto remarks that 'admissions are defeasible; people lie or are self-deceived about why they act', so that rationality provides 'fairly robust methods for testing, questioning and challenging such testimony when it is important to do so, as in legal cases'.[92] Therefore, if first-person accounts are not coherent with the action, under the same rationality used to interpret strategies, they should be rejected as unacted.[93]

iv. Intentional design

The interpretative framework so far established allows us to tackle some of the Court's general pronouncements on intent. What is contentious is the Court's tendency to differentiate between, on the one side, undertakings' intention, and on the other, the purpose of agreements and abusive conduct. This makes it appear as if agreements and abusive conduct do not reflect the undertakings' intention and can therefore be interpreted autonomously. The result, stated at the outset, is the case law which establishes that intent is not a 'necessary' element for establishing a restriction by object under Articles 101 or an abuse of dominance under Article 102.[94] This case law has been taken literally by the majority of the doctrine.[95] The reality, as described next, is that agreements and abusive conduct can only be understood in light of undertakings' intention, since they can only reflect that intention. In other words, if they are designed for a purpose, it is the one given by the designer. Hence, intention is indeed a necessary element for interpreting agreements and abusive conduct.

Under Article 101, several judgments on restrictions by object separate the purpose of agreements from undertakings' intention. The first is *Compagnie Royale Asturienne des Mines*, where one of the parties attempted to discharge responsibility for clauses which the other party had inserted in the contract.[96] The Court replied that it was not necessary 'to verify that the parties had a common intent', but only to examine 'the aims pursued

[92] Hutto (2009) 12.
[93] This means that internal documentation and statements are admissible evidence, but do not automatically prove the corresponding intent.
[94] *Glaxo* (fn. 28) 58 and *Tomra* (fn. 26) 20.
[95] See Bailey (2012) 578 and Whish and Bailey (2012) 119.
[96] *Compagnie Royale Asturienne des Mines* (fn. 26) 25.

by the agreement as such'.[97] This was followed by *IAZ*, which dealt with a system of labels involving several undertakings. Some of these undertakings, but not all, had acted in way which made clear the intent to restrict parallel imports.[98] The Court thus declared that the agreement's 'purpose' was to restrict competition regardless of whether this was 'the intention of all the parties'.[99] The same idea was also expressed by the Court in *BIDS*, albeit using distinct terminology. In *BIDS*, the members of a nationwide arrangement to reduce capacity claimed that its purpose was not to adversely affect competition, but to rationalise production.[100] The Court rejected this argument, stating that close regard should be paid to 'to the objectives which [the agreement] is intended to attain', but that it was irrelevant whether the parties 'acted without any subjective intention of restricting competition'.[101]

These judgments are taken as good authority by the doctrine for the proposition that it is not necessary to examine the intentions of the parties when assessing restrictions by object.[102] *IAZ* and *BIDS* are cited by the Court in *Glaxo*, where the Court examined an agreement setting higher prices for products set for exportation to other Member States than those for domestic consumption. *Glaxo* sets out the current case law formula opposing the agreement's 'objectives', which must be considered, and the parties' 'intention', which 'is not a necessary factor in determining whether an agreement is restrictive', although such intention can still be taken into account.[103] A similar formula has also been employed under Article 102. In *Tomra*, an appeal from a General Court judgment, the Court had to decide whether the consideration of subjective factors was precluded by the definition, in earlier case law, of abuse of dominance as 'an objective concept'.[104] The Court starts by stating that the Commission 'is necessarily required to assess the business strategy pursued by [the dominant undertaking]', so that the Commission may 'refer to subjective factors, namely the motives underlying the business strategy in question'.[105] The Court then states that 'anti-competitive intent

[97] *Compagnie Royale Asturienne des Mines* (fn. 26) 26.
[98] *IAZ* (fn. 26) 24.
[99] *IAZ* (fn. 26) 25.
[100] *BIDS* (fn. 25) 19.
[101] *BIDS* (fn. 25) 21.
[102] See Bailey (2012) 578 fn. 129, Ibáñez Colomo (2012) 548 and Whish and Bailey (2012) 119.
[103] *Glaxo* (fn. 28) 58, citing *IAZ* (fn. 26) 16-21 and 23-25 and *BIDS* (fn. 25) 16-21. This formula was repeated in Case C-32/11 *Allianz Hungária* [2013] ECR nyr 37.
[104] *Tomra* (fn. 26) 22-24.
[105] *Tomra* (fn. 26) 19.

constitutes only one of a number of facts which may be taken into account', and that the Commission 'is under no obligation to establish the existence of such intent'.[106]

Summarising these judgments, the Court has differentiated between the purpose of the agreement or abusive conduct (in the form of 'aims', 'objectives' or 'strategy'), which must necessarily be considered, and undertakings' intention ('common intent', 'subjective intention' or 'motives'), which may be considered but is not necessary. Taken literally, as most doctrine has, such judgments would mean that the main task in applying Article 101 and 102 is to interpret the agreement or abusive conduct. The question is whether such interpretation can be severed from the interpretation of undertakings' intention, relegating the latter to a secondary role. The answer lies with the interpretative 'stance' taken towards the agreement or abusive conduct. In her Opinion in *T-Mobile*, Advocate-General ('AG') Kokott compared restrictions by object under Article 101 with risk offences in criminal law, providing a good example of the application of the 'physical stance':

> 'in most legal systems, a person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant'.[107]

AG Kokott's analogy in *T-Mobile* is flawed in several ways, starting at the interpretative level. The risk offence described is established by applying the 'physical stance' to the act of driving and the consumption of alcohol or drugs, as many risks can be interpreted from physical activities and states. In EU competition law, the physical manifestations of agreements and abusive conduct – signing papers, verbal communications, displaying selling conditions, etc. – are meaningless in themselves. While the purpose of driving under influence of alcohol or drugs is irrelevant for risk offences, the purpose of agreements and abusive conduct is everything for EU competition law. Therefore, useful interpretations can only come from the 'design stance' and the 'intentional stance', which both consider purpose.

Agreements and abusive practice, in particular if it involves the application of contracts, can be interpreted under the 'design stance' as designed for a certain purpose and

[106] *Tomra* (fn. 26) 20-21.
[107] Opinion *T-Mobile* (fn. 73) 47.

operating accordingly. Thus, in *Compagnie Royale Asturienne des Mines* the Court stated that the export clauses were 'designed to prevent the re-export of the goods to the country of production so as to maintain a system of dual prices and restrict competition within the common market'.[108] The expression of being 'designed' for a certain purpose has also been employed in relation to abusive conduct.[109] It should be noted that the 'design stance' is the basis for the analysis of anti-competitive effects, by extrapolating effects from the purpose of certain practices.[110] This explains why authors defending an 'effects-based approach' are comfortable with interpreting anti-competitive behaviour without considering undertakings' intention.[111] In this line, Akman asks why intent would be necessary if 'there is already implementation on the market which is anticompetitive and which can be objectively established'.[112] A strategy, as referred above, is also designed with a purpose. The question, however, is where does the designed purpose comes from. The answer is that it can only come from the designer.[113]

The interpretation of agreements and abusive conduct, in particularly strategies, involves an 'intentional design': the designed purpose can only be discerned by applying the 'intentional stance'.[114] This can be observed, for example, in the above quote from *Compagnie Royale Asturienne des Mines*: the design might be to prevent re-exporting, but this comes from the undertakings' intention to 'maintain a system of dual prices and restrict competition within the common market'.[115] More often, the agreement or abusive practice is simply interpreted as a strategy under the 'intentional stance'. Thus, the Court stated in *IAZ* that the agreement 'clearly expresses the intention

[108] *Compagnie Royale Asturienne des Mines* (fn. 26) 28.
[109] *United Brands* (fn. 16) 194, Case 85/76 *Hoffman-La Roche* [1979] ECR 461 90 and Case C-457/10 P *AstraZeneca* [2012] nyr 131.
[110] For example, the purpose of an exclusivity obligation is to bind a distributor to only one producer, and from there it is possible to assess the effects on the market. As remarked above, it is not possible to assess such effects by applying the 'physical stance' to the material manifestations of the distribution contract.
[111] See Bailey (2012) 559 and Whish and Bailey (2012) 200-201.
[112] Akman (2014) 42 fn. 148.
[113] Dennet (2009) 2-3 gives the example of applying the 'design stance' to an alarm clock, quickly reasoning that by depressing a few buttons some time later it will make a loud noise'. One can nonetheless imagine the difficulties without considering the intention of the clock's producers': pressing the buttons would yield no immediate result, only for it to come to life in apparently random fashion later. It is possible to some extent apply to reverse-engineer physical objects, but as noted above in relation to the 'physical stance', this is hardly applicable to market practices. Even then, it is possible that the purpose will not be understood: the alarm-clock may be considered a device for making pranks instead of being used for waking up in the morning.
[114] The mixture of the 'design stance' and the 'intentional stance' is not unusual: as remarked above an undertaking is itself the product of design, but one to create a system that is interpreted as an agent. Dennet (2009) 3 also comments that the 'intentional stance' is 'a subspecies of the design stance'. While the 'intentional stance' could also be applied to the agreements and abusive conduct themselves, it has not been argued that they should be interpreted as agents with belief and desires.
[115] *Compagnie Royale Asturienne des Mines* (fn. 26) 27-28, where the Court interpreted undertakings' action in the form of the orders placed under the agreement.

of treating parallel imports less favourably than official imports with a view to hindering the former'.[116] Equally, the Court observed in *BIDS* that the arrangements were 'intended therefore, essentially, to enable several undertakings to implement a common policy' which encouraged 'some of them to withdraw from the market' and thereby reduce 'the overcapacity which affects their profitability'.[117] None of these findings could have been derived by looking at the purpose of the agreement or abusive conduct without considering the undertakings' beliefs and desires.

As such, it is argued that the case law quoted as authority for undertakings' intention not being a necessary factor all resort to such intention, since without it the agreement's 'objectives' would not be understandable. The 'business strategy' which must necessarily be considered according to case law naturally also reflects the dominant undertaking's intention. The case law that undertakings' intention is not necessary to establish an infringement of Articles 101 and 102 does not conform to interpretative reality. That case law can be explained by other reasons. In *Compagnie Royale Asturienne des Mines* and *IAZ*, the Court dismissed 'common intent' and 'the intention of all the parties' in order to define an agreement under Article 101 in such a way that departed from contract law demands, as discussed in Chapter IV (on restrictions of competition). In *BIDS*, *Glaxo* and *Tomra*, the Court rejected 'subjective intention', 'intent' and 'intention' in order to signal that certain motives and the knowledge of illegality were not legally relevant, as examined further below. Nonetheless, considering the confusion that the case law has caused in relation to the value of undertakings' intent, it would certainly have been better if the Court avoided such a roundabout way to reach these results.

v. Legal interpretation

The fact that the Court necessarily relies on undertakings' intentions to interpret agreements and abusive conduct, as just seen, raises the question of why does the Court not admit to so doing. It is certainly very convenient to dismiss undertakings' intentions without engaging in an in-depth reasoning, as Court does by rejecting 'common intent' and the 'intention of all the parties' in *Compagnie Royale Asturienne des Mines* and

[116] *IAZ* (fn. 26) 23.
[117] *BIDS* (fn. 25) 33.

IAZ, but it must be remembered that the Court also stated in *Bayer* that an agreement involves 'an invitation to the other party, whether express or implied, to fulfil [an anti-competitive goal] jointly'.[118] It also seems contradictory that the Court states that anti-competitive intent does not have to be established in *Tomra* while demanding such intent for predatory pricing in *France Télécom*.[119] Nonetheless, these are not unsurmountable obstacles. The Court could have said that an agreement requires an undertaking's intention but not full joint intention, as held in Chapter III (on collusion), or that abusive conduct can depend on intent or effects-based tests, as described in Chapter V (on abuse of dominance). It is submitted that the reason why the Court separates undertakings' intention from the purpose of agreements and abusive conduct lies in an involuntary confusion between the interpretation of intent and legal interpretation.

The interpretation of intent and legal interpretation are similar in their objective, but differ in their methodology. As Dworkin states, (non-causal) interpretation is about discerning the purpose of its object, so that '[w]e find it natural to report our conclusions, in each and every genre of interpretation, in the language of intention or purpose'.[120] Nonetheless, the interpretation of intent and legal interpretation involve different methods. This relates to Dworkin's distinction between 'conversational' and 'constructive' interpretation. Conversational interpretation applies the 'intentional stance', insofar as someone listening to a conversation assigns meaning 'in the light of the motives and purposes and concerns [the listener] supposes the speaker to have, [reporting] conclusions as statements about his "intention" in saying what he did'.[121] As seen above, the same reasoning should apply to interpreting undertakings' intention.[122]

In contrast, constructive interpretation aims to 'interpret something created be people as an entity distinct from them'.[123] Under constructive interpretation, and contrary to what was stated above, the purpose of a 'designed' entity is not that of its designer. Dworkin describes this as 'imposing purpose on an object or practice in order to make it the best

[118] *Compagnie Royale Asturienne des Mines* (fn. 26) 26, *IAZ* (fn. 26) 25 and Cases C-2-3/01 *Bayer* [2004] ECR I-23 102.
[119] *Tomra* (fn. 26) 20 and *France Télécom* (fn. 24) 109.
[120] Dworkin (2011) 125.
[121] Dworkin (1998) 50. Dworkin (2011) 129 adds that 'conversational interpretation' normally conforms to the 'psychological state theory', so that its success lies in matching the interpretation with 'mental states'. This only matches the 'intentional stance' if those psychological states are seen as an application of 'folk psychology'.
[122] Black (2008) 107 fn. 21 comments that interpreting an agreement under Article 101 'does not perfectly fit any of Dworkin's categories: conversational interpretation is the closest, but needs to be stretched to include non-verbal agreements'.
[123] Dworkin (1998) 50.

possible example of the form or genre to which it is taken to belong'.[124] Legal interpretation is a form of constructive interpretation and, as Dworkin also observes, it is widely held that the purpose of legal norms does not depend on the intention of the historic legislator.[125] Nonetheless, such intention may nevertheless prove useful – in other words, it is not necessary but may be taken into account.[126] As described above, this is the method that the Court applies to undertakings' intention.

The Court applies legal interpretation to undertakings' intention because it is a public law court used to dealing with institutional actors with normative 'intentions', not private actors with 'mentalistic' ones.[127] The Court's main activity consists in judging the conformity of Member States' legal order with EU law, either directly, through infringement procedures, or indirectly, through preliminary references.[128] When analysing the Member States' legal order, it follows correct legal interpretation in ignoring the intention of the historic legislator. This is most evident in relation to the free movement provisions of the Treaty, which lead Member States to plead justifications not envisaged by the historic legislator but which constitute valid claims under EU law.[129] The situations where the Court has to judge private behaviour under EU law are much more limited. The portion involving undertakings under EU competition law is not even dealt with directly, but within appeal procedures of administrative decisions.[130] Like Member States', the actions of the Commission are not interpreted as intentional, but as the normative application of EU law.[131] It is a small step for the Court to adapt the method used for the majority (and most important) of its actors to the less frequent matters involving undertakings.

The fact that the Court uses the same interpretative methods for undertakings and institutional actors comes across in the case law on 'objective justifications'. As

[124] Dworkin (1998) 52.
[125] Dworkin (2011) 129.
[126] See Dworkin (1998) 314-315.
[127] This does not mean that the 'intentional stance' cannot be applied to Member States – on the contrary, as Clark (1994) 405 states, the actions of States are interpreted in this manner. The judicial function, however, requires legal interpretation.
[128] See Articles 263 and 266.
[129] For example, in Case C-42/07 *Liga* [2009] ECR I-7633 42 the Court stated that '[i]n so far as the objectives of the Portuguese legislation on games of chance are not set out in the order for reference, the Court will be required to answer the question referred by having particular regard to the objectives referred to by the parties to the main proceedings and by the Portuguese Government before the Court'. Since the Court is limited by the factual and legal background of the reference, the objectives proposed by the parties are taken from the interpretation of EU law.
[130] Such appeals are either of national competition authorities' decisions, through preliminary references from national courts, or Commission decisions on appeal from the General Court.
[131] Acts of legislative character, such as regulations and directives, are clearly of a normative character. This is also the case with individual and specific acts, like Commission decisions, since they are interpreted as applying EU law and not reflecting the institutions' 'mentalistic' states.

described in more detail in Chapter IV (on restriction of competition) and Chapter V (on abuse of dominance), behaviour that infringes Articles 101 and 102 can be considered justified in certain circumstances. In doing so, the Court mixes the interpretation of undertakings' intention with public interests pursued by Member States. Under Article 101, the Court has considered that a restrictive selective distribution system can be justified if resellers are chosen according to objective and non-discriminatory criteria and this is required to ensure a product's quality and proper use.[132] This normally involves interpreting the purpose of the system as intended by the undertakings running it.[133] Nonetheless, in *Pierre Fabre* the Court expressly refers to justifications accepted in its free movement case law in order to assess whether the selective distribution system could be objectively justified.[134] This assumes that the objective justification is interpreted in the same manner regardless of whether it is applied by undertakings when restricting competition or Member States when restricting free movement.

Nevertheless, one thing is for undertakings to pursue a policy reflecting public interests, another for Member State restrictions to do so. If such purpose cannot be interpreted from the undertakings' agreement, there is no other source for it.[135] In contrast, even if such purpose was not originally pursued by the Member State, it can be constructively interpreted from the Treaty provisions and its case law. Moreover, economic interests are not admitted as justification for Member State restrictions, while they are for undertakings.[136] The Court again mixes these two interpretations under Article 102, by mentioning in *Post Danmark* as possible justifications both objective necessity and efficiencies.[137] Efficiencies reflect the exception of Article 101(3), and again have to be interpreted from the practice itself.[138] Objective necessity, as Jones and Sufrin argue, relates to public interests and can therefore be constructively interpreted.[139] Objective necessity also contrasts with the protection of commercial interests under Article 102,

[132] Case C-439/09 *Pierre Fabre* [2011] ECR I-9419 41.
[133] Case 31/80 *L'Oréal* [1980] ECR 3775 16.
[134] *Pierre Fabre* (fn. 132) 44.
[135] It could be argued under an 'effects-based approach' that such purpose is unnecessary as long as the corresponding effects take place. However, as noted above, such effects are the result of applying the 'design stance': they take place, or are likely to take place, because that is the purpose of the practice (as intended by its authors). If the practice cannot be interpreted as designed to do so, then it cannot be connected to the effects. This obstacle cannot be overcome by establishing causality relationships through the 'physical stance'. One can imagine a selective distribution system which cannot be interpreted in any way, directly or indirectly, as pursuing consumer safety. Consumer injuries might increase without such system, simply because output will be increased by more distributors. Nonetheless, this cannot be held as a reason for justifying the selective distribution system.
[136] Case 95/81 *Commission v Italy* [1982] ECR 2187 27.
[137] Case C-209/10 *Post Danmark* [2012] ECR nyr 41.
[138] *Post Danmark* (fn. 137) 42.
[139] Jones and Sufrin (2014) 386-387.

admitted by the Court as justification as long as it is the 'actual purpose' of the dominant undertaking.[140] The 'actual purpose' pursued by a Member State is never inquired, since the normative purpose can come from EU law. In short, the policies pursued by undertakings, either motivated by public interests or commercially, must result from their intention since, unlike Member States, constructive legal interpretation is unavailable. Nonetheless, the Court treats both interpretations as the same.

Legal interpretation is also at the origin of the definition of abuse of dominance as an 'objective concept'. This definition has been quoted by the Court, as stated above, for undertakings' intention not being necessary for establishing an infringement of Article 102.[141] When the Court separates the abusive conduct from undertakings' intentions, it treats it as a Member State policy. For the same reasons, State aid has also been referred to as an 'objective concept' in the case law.[142] Nevertheless, while State aid can be legally interpreted separately from the historic legislator, the interpretation of abusive conduct is bound to the dominant undertaking's intention.[143] It should be mentioned that, despite the wrong interpretative starting point, abuse is indeed an 'objective concept'. The Court first employed this definition in *Hoffman La-Roche* in order to dismiss an instrumental use of the dominant position to commit the abuse, setting both as separate conditions for applying Article 102.[144] It should be noted however that the Court had already done the same in *Continental Can* without using such definition.[145] The 'objective' character lay in establishing the legal concept of abuse.

This indicates that 'abuse' is a normative concept, depending on 'objective' legal interpretation and not on a subjective decision, such as those part of the Commission's administrative discretion. The same nonetheless applies to all the conditions of Articles 101 and 102, and the conditions for finding State aid also, making the qualification of 'objective' somewhat pleonastic. This explains why the Court occasionally drops the

[140] The purpose must not be the strengthening of its dominant position, which led to the Court not applying this justification in *United Brands* (fn. 16) 189.
[141] *Tomra* (fn. 26) 20-24.
[142] Case C-487/06 P *British Aggregates* [2008] ECR I-10515 73 and Case C-279/08 *Commission v Netherlands* [2011] ECR I-07671 39.
[143] Eilmansberger (2005) 146 mentions that the definition of abuse as an 'objective concept' appears to support the argument that Article 102 requires neither intent or effects, which points towards a normative interpretation as applied to State aid.
[144] *Hoffman-La Roche* (fn. 109) 71. As discussed in Chapter V (on abuse of dominance), in *Hoffman-La Roche* the Court instituted an intent-based rule of considering certain rebates as abusive. Therefore, the notion of abuse as an 'objective concept' is not incompatible with the use of intent. On the contrary, the instrumental use of the dominant position which was used to reject would have led to an effects analysis.
[145] Case 6-72 *Continental Can* [1973] ECR 215 27 and 29.

reference to 'objective' in relation to justifications.[146] It also means that EU competition law may be applied based on subjective facts, notably undertakings' intention, because the objective character is in the treatment it gives to such facts. In the Opinion in *AstraZeneca*, AG Mazak stated that requiring the intent to defraud would be contrary to the definition of abuse as an 'objective concept'.[147] Nonetheless, one can see that the concepts of 'agreement' and 'restriction by object' under Article 101 do not cease to be objective because they depend on the parties' intentions.[148] As long as intention can be objectively verifiable, as the Court declared in relation to supposedly 'subjective' internal documentation, then it is 'objective'.[149]

2. Legal relevance

This section will define intent as the intention which is legally relevant under EU competition law. It was seen above that such intention should be understood as an undertaking's decision to act on its beliefs and desires. This means that EU competition law applies by considering certain decisions, beliefs and desires as relevant (or not) for the production of legal effects. For example, an undertakings' decision to set a certain market price can be prohibited under Article 101 or constitute legitimate competition depending on whether it is acting on the desire to abide by another undertakings' intentions or on freely available market knowledge. The characterisation of intent will therefore depend on how the conditions of Article 101 and 102 are applied in the case law, examined in the corresponding chapters throughout the present research. It is nevertheless possible to outline general conditions which will always apply for intention to be legally relevant, or which indicate that certain intention will never be legally relevant. This section will examine these general conditions. It will be advanced that only the intention which has been implemented, and therefore is capable of producing

[146] *Post Danmark* (fn. 138) 41.
[147] Opinion *AstraZeneca* (fn. 109) 50.
[148] The analogy can be extended to the use of intent in any other field of law, as long it cannot be authentically interpreted by its author.
[149] See *France Télécom* (fn. 24) 96 and *BIDS* (fn. 25) 21.

effects, is legally relevant. Otherwise, as remarked, which particular decisions, beliefs and desires are legally relevant is individually decided by the case law.[150]

The conditions which are generally legally relevant or irrelevant are reflected in the doctrine's definitions of intent. As seen above, definitions based on differences between 'objective' and 'subjective' intent are inadequate. Few authors have attempted a definition outside that framework. In US antitrust, Stucke has proposed a definition of intent based on 'state of mind', which would be composed of '(1) the actor's motive for undertaking the action, (2) her awareness of undertaking the action, and (3) her awareness of the action's natural and probable consequences'.[151] In EU competition law, Nazzini has also adopted a definition if intent as 'a subjective state of mind' composed of 'general' and 'specific intent': the first 'the intent of carrying out the relevant conduct', the second 'the intent to cause the harm that the law prohibits'.[152]

As described above, definitions of intent as a 'state of mind' are directly inspired by criminal law. This assumes that there is a well-defined physical conduct which indicates the implementation of the intent, and of which the agent must be self-aware in order to be legally relevant. Hence, the definitions of Stucke and Nazzini use conduct as a reference point to differentiate the intent over it, and its immediate consequences, from more remote intent in the form of 'motives' or 'harm'. As discussed below, these assumptions do not hold. It will be seen that the implementation is based on the capability to produce effects, not the conduct (i). Then, it will be demonstrated that awareness is not legally relevant in EU competition law (ii). Finally, motives will be integrated in a unified definition of intention (iii).

i. Implementation

In order for intention to be legally relevant, it must be implemented in a significant manner. Nazzini states that in modern legal systems it is 'uncontroversial that nobody can be punished purely because of his own thoughts or intentions', and therefore

[150] As described above, an undertaking is defined by the exercise of economic activity, so that intention unrelated with this activity cannot be attributed to the undertaking (and therefore it is not necessary to assess its legal relevance).
[151] Stucke (2012) 809.
[152] Nazzini (2011) 57-58.

criminal law imposes a so-called 'act requirement'.[153] The application of the 'intentional stance' to undertakings in EU competition law, however, largely removes the possibility of punishing purely internal states by abstracting from a 'state of mind' and taking as its starting point the interpreting of an action. This means that any beliefs and desires which are successfully attributed must be reflected in the decision to act. As observed above, this also applies to expressions of a 'state of mind', such as internal documentation and statements.[154] Under the 'intentional stance', the only possibility of intention without action is a prediction.[155] The 'intentional stance' is just as useful for prediction as for interpretation: in the common example of driving, one can rely on the knowledge of traffic rules and the desire to stay alive to both understand the actions of drivers met today and predict their actions tomorrow.[156] Nonetheless, as Anscombe notes, predictions – including expressions – are not intention: a decision to act may very well come, but until it does there is no intention.[157] The action is thus, as quoted above from Anscombe, the 'very first thing' to consider for the interpretation of intention, which also applies to in relation to Articles 101 and 102.[158]

Considering that an action can have different degrees of implementation, the question is the requisite legal standard. Eilmansberger mentions that intent must be accompanied by an 'agreement or coordination of conduct' under Article 101 or 'evidence of relevant conduct' under Article 102.[159] The emphasis on material conduct presupposes, similarly to the example of driving under the influence of alcohol or drugs in the Opinion of AG Kokott in *T-Mobile*, that a physical action can be competitively significant independently of its purpose. Nonetheless, as held above, material conduct itself lacks competitive relevance. For example, a cartel agreed upon before price regulation is set in place involves an agreement, and an abusive obligation imposed on its distributors on the eve of stocks being permanently exhausted also involves the relevant conduct. Nevertheless, they should not be considered implemented, since the action lacks competitive relevance – for EU competition law purposes, it is the same as if it was

[153] Nazzini (2011) 58 and Wilson (2011) 73-74.
[154] In fact, Nazzini is not referring to internal states of mind but to their expression, which is commonly punished in totalitarian regimes.
[155] This is not the same as predicting the continuation of an action already engaged into, particularly if part of a strategy which, as described above, may link several decisions.
[156] See Dennet (2009) 5-6.
[157] See Anscombe (1963) 1-5.
[158] See Anscombe (1963) 9.
[159] Eilmansberger (2005) 148.

purely conjectured.[160] The requisite legal standard of implementation must therefore be set higher than material conduct.

It is argued that the legal standard for implementation should be set at the capability to produce the intended effects.[161] Nazzini states that 'intent must be implemented in acts that are objectively capable of causing the harm in question'.[162] The 'harm' should be understood in light of the anti-competitive character of the intent, discussed in Chapter II (on judging intent), and not be confused with anti-competitive effects. For example, as mentioned in Chapter IV (on restrictions of competition) and Chapter V (on abuse of dominance), a cartel lacking sufficient organisation and market power to operate, or below-cost prices by a dominant undertaking which competitors can withstand, are both incapable of causing anti-competitive effects.[163] However, these are considered anti-competitive because of their intent, namely to condition economic independence and to harm competitors, and are also considered implemented. This is because the capability to produce effects is enough to capture the situations where anti-competitive intent is put in action to a sufficient degree.[164] Thus, these examples are capable of conditioning cartel members and to harm competitors, even if they do not lead to the desired outcome. In these situations, Articles 101 and 102 are applied similarly to inchoate offences in criminal law.[165] Those offences are also intent-based and only require that the intent is implemented, even if it may not come to fruition.[166]

The Court has adopted the standard of the capability to produce effects under Article 101 since, as will be discussed in Chapter IV (on restrictions of competition), restrictions by object are based on intent. The Court stated in *T-Mobile* that a restriction by object must 'be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of

[160] This means that the doctrine of 'State compulsion', as described by Jones and Sufrin (2014) 186-187, is an issue of impossibility of implementation rather than one of free will.
[161] Those effects are also used for other aspects of EU competition law, such as affecting trade between Member States and extraterritoriality, when the infringement is intent-based.
[162] Nazzini (2011) 58.
[163] Nazzini (2011) 58 fn. 20 gives another example of 'a voodoo ritual performed aimed at destroying a competitor in order to protect the undertaking's dominant position'.
[164] As stated in Chapter IV (on restrictions of competition) and Chapter V (on abuse of dominance), actual or likely effects are (or should be) the proper standard for anti-competitive effects. Nazzini (2011) 298-299 attributes the use of these different standards in to the type of harm, with capability to produce effects being the adequate one for a test of intent, but as discussed in Chapter II (on judging intent), Nazzini assumes that the harm is caused and not in the intent itself.
[165] See Wilson (2011) 503.
[166] Implementation of inchoate offences in criminal law, of course, can be different from EU competition law and not follow the standard of capability to produce effects.

competition'.[167] As described above, a strategy is interpreted in abstract, according to economic rationality, as being capable of producing the desired effects. If a strategy is credible, implementation can be presumed. As will be examined in Chapter III (on collusion), a formalised agreement (which does not depend on the interpretation of behaviour) is presumed to be capable of producing the agreed effects. Equally, the Court stated in *T-Mobile* by stating that a concerted practice implies 'subsequent conduct on the market' and that, as already stated, undertakings are presumed to take into account the information exchanged.[168] Hence, the capability to produce effects has not been applied as an added test of restrictions by object, but as a presumption operating on most form of collusion. This presumption will hold unless the strategy does not work, which is uncommon. Cartel members may argue that they have not implemented the agreement, but as discussed in Chapter III (on collusion) this does not prevent it from being capable of producing effects in relation to other members.[169]

The Court has also applied the standard of capability to produce effects under Article 102, but as examined in Chapter V (on abuse of dominance) it has apparently not limited it to intent-based abuses. Thus, in *Tomra* it presented such capability in alternative to the likelihood of producing effects, which allows effects-based abuses to align to the lowest threshold.[170] In any event, in *AstraZeneca* the Court applied the standard of capability to produce effects to the intent to harm competitors, namely through a misleading application to extend intellectual property protection.[171] Again, the capability to produce effects, and therefore implementation, is presumed from a credible strategy. In *AstraZeneca* the Court addressed a rare challenge to that implementation, as the dominant undertaking alleged that there was no effect on competition considering that the misleading applications were withdrawn before the original protection expired.[172] The General Court examined whether the applications 'were liable to lead the public authorities to grant the exclusive right'.[173] This does not concern the

[167] *T-Mobile* (fn. 73) 31.
[168] *T-Mobile* (fn. 73) 51.
[169] As noted by Whish and Bailey (2011) 105, the General Court has accepted that liability may be excluded in these situations by 'public distancing', falling under the idea of reversing the presumption of implementation, but this involves sanctioning aspects and is yet to be confirmed by the Court.
[170] *Tomra* (fn. 26) 68.
[171] *AstraZeneca* (fn. 109) 376.
[172] *AstraZeneca* (fn. 109) 102. The dominant undertaking also argued that in two Member States where the extension did come into effect it no longer held a dominant position, but the Court considered that the relevant point in time for the abuse was the application for the extension, see *AstraZeneca* (fn. 109) 105 and 110.
[173] Case T-321/05 *AstraZeneca* [2010] ECR II-2805 377. This is what the General Court refers to as 'objectively misleading', confirming that the capability to produce effects is included in the definition of abuse, see GC *AstraZeneca* (fn. 173) 359.

exclusive right's effects on competition, which require an analysis of the market and not of the behaviour of the public authorities. The Court recognised that this was an issue of implementation, but since the extension could harm competitors (which will likely assume it is valid and not prepare for its withdrawal) rejected the dominant undertaking's argument.[174]

ii. Awareness

The awareness of committing an action is typically important for the attempt to capture a 'state of mind', and may be considered a general requirement for finding intent.[175] Thus, awareness of the action features is the second condition in Stucke's definition.[176] Nazzini also bases the concept of 'general intent' (as opposed to 'specific intent') on awareness, exemplifying it with a dominant undertaking pricing at predatory cost levels 'neither inadvertently nor by mistake'.[177] The issue of awareness is tied to physical conduct, in particular the very human characteristic of acting unconsciously. This problem, however, does not affect the application of the 'intentional stance' to undertakings. The attribution of the beliefs that undertakings 'ought to have' makes it virtually impossible for economic activity to be interpreted as conducted unconsciously.[178] Nazzini's example of inadvertently pricing below cost could never be interpreted rationally from the action. Even if internal documentation surfaced showing mistakes or ignorance of cost levels, it would be set aside in favour of the objective interpretation that an undertaking must know its costs in order to operate in the market. Ultimately, an undertaking is always in possession of cost information as long as it has contracted or paid such costs. Therefore, awareness of committing an action is not a condition for intention to be legally relevant in EU competition law.

---

[174] The General Court paragraphs cited do not pursue an effects-based analysis of potential competition – on the contrary, the General Court states that the extension is capable to restrict competition from the moment it is misleading 'even assuming that there is no such effect' on potential competition, *AstraZeneca* (fn. 109) 108 and GC *AstraZeneca* (fn. 173) 380.

[175] The awareness of committing an action has important philosophical and empirical implications, with its absence sabotaging reason-giving, as referred by Anscombe (1963) 11-12, and if perceived making 'folk psychology' harder to apply, as reported by Malle and Knobe (1997) 115-116.

[176] See Stucke (2012) 809.

[177] See Nazzini (2011) 57-58.

[178] Mistaken beliefs are possible, but as examined by Dennet (1987) 84-83 particularly difficulty since they depend on irrationality. The arguments dismissing lack of awareness in pricing below cost could also apply to claims of mistake. Nevertheless, the issue examined is whether awareness is a general condition, not the presence or absence of particular beliefs, which will depend on their particular legal relevance.

In the same manner, the application of the 'intentional stance' to undertakings also prevents them from being unaware of the consequences of their actions. An action must be capable of producing the desired effects in order to be interpreted as a credible strategy, as already stated, so that the undertaking must be aware of those effects.[179] As such, instead of market consequences, undertakings have more often claimed that they were unaware of the legal consequences of their actions. This would usually be a question of the adequate sanction, not establishing a substantive infringement.[180] However, knowledge of illegality is a substantive requirement for non-ethical offences (often administrative, but also criminal) in some Member States, leading undertakings to claim they were unaware of liability under EU competition law.[181] Regulation 1/2003 expressly denies the criminal law nature of EU competition law sanctions, but it has been accepted for some time that this is not the correct reading under the European Convention of Human Rights.[182] Despite such indications, characterisations such as the analogy with driving the under the influence of alcohol or drugs in AG Kokott's Opinion in *T-Mobile* have misguidedly reinforced this non-ethical view.[183]

The Court has stated that the lack of knowledge of illegality does not prevent an infringement under Articles 101 and 102, which is coherent with the moral character of the infringement. However, rather than recognising this character, authors have interpreted this as another proof that intent is not necessary.[184] In this regard, it is worth mentioning *BIDS* again, where the Court stated that whether undertakings had 'any subjective intention to restrict competition' was irrelevant.[185] Although this has been read literally in the doctrine, the fact is that the Court found that an arrangement

[179] The only such possibility concerns effects which go beyond those envisaged by the strategy, but in that case the infringement must be based on anti-competitive effects and not intent (since the intent does not include the knowledge or desire of those effects).

[180] As set out in the Introduction, the present research will not cover issues of sanctioning. Intent plays a particular role there, as can be seen in *United Brands* (fn. 16) 298-301 by the Court admitting the possibility of negligence despite finding an intent-based abuse of preventing parallel trade (due to the unprecedented finding of a dominant position with such low market shares). This contrasts with Case 19/77 *Miller* [1978] ECR 131 18, where the Court stated that 'it is of little relevance to establish whether the applicant knew that it was infringing the prohibition contained in [Article 101]', again a question of sanctioning since the Court refused to consider wrong legal advice as a mitigating circumstance.

[181] See Rojac and Lynskey (2013) 28, arguing that an undertaking should not be held responsible when the error of law was 'unavoidable', which implies that such error is not ethically evident.

[182] See Jones and Sufrin (2014) 936-938.

[183] While driving under the influence of alcohol and drugs in general can be said to have ethical repercussions, the exact alcohol limit or types of drugs covered in each Member State, like other traffic rules described by Wilson (2011) 125, depend on an administrative and technical decision and not the ethical background which allows presuming the knowledge of illegality in criminal law. Hence, alcohol limits are usually clearly advertised when passing a Member State's borders.

[184] See Bailey (2012) 578.

[185] *BIDS* (fn. 25) 21. Hence it cannot be said, as Ibáñez Colomo (2012) 548 does, that *BIDS* is any authority in relation to the 'absence of anti-competitive intent'.

between producers 'intended' to reduce capacity infringed Article 101.[186] Since any such arrangement represents the parties' intention, the Court's reference to the irrelevant 'subjective intention to restrict competition' must mean something else.[187] The parties argued that their purpose was not to 'adversely to affect competition', indicating that they did not know that reducing capacity would infringe Article 101.[188] As such, it must be concluded that the Court was referring to the absence of knowledge of illegality. This was stated more clearly in *Schenker*:

> 'the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct'.[189]

Similarly, in *Tomra* the Court stated that the Commission was 'under no obligation to establish the existence of [anti-competitive intent]' under Article 102, but also stated that it had to examine the dominant undertaking's 'strategy'.[190] To some extent, it is true that anti-competitive intent is unnecessary when, as discussed in Chapter V (on abuse of dominance), the specific abuse is based on effects. Nonetheless, *Tomra* can also be read, in line with the Article 101 case law, as knowledge of illegality not being required for finding an abuse of dominance. The Court's statement in *United Brands* that 'special knowledge of antitrust laws' may come from experience in international trade appears to consider knowledge of EU competition law, like that of economic conditions, as something that the dominant undertaking 'ought to have'.[191] Eilmansberger considers that the notion of abuse as an 'objective concept' should be read as dispensing 'fault', identified as 'the firm's awareness of the illegality of its conduct'.[192] The lack of a 'fault' was indeed argued by the Commission in *Hoffman-La Roche*, but was not expressly dealt with by the Court.[193] It will be discussed in Chapter II (on judging intent) that there is a negative judgment, which implies that there also is

[186] *BIDS* (fn. 25) 33-34.
[187] It is assumed that the 'subjective intention to restrict competition' does not involve a higher reasoning on the impact of the agreement on the competitive process, in the same manner that the intention to steal does not require a meditation on the impact of theft on the system of property.
[188] *BIDS* (fn. 25) 19.
[189] *Schenker* (fn. 16) 37. As discussed in Chapter IV (on restrictions of competition), the 'anti-competitive nature' is part of the defining characteristics of restrictions by object.
[190] *Tomra* (fn. 26) 19-21.
[191] *United Brands* (fn. 16) 299. The Court also referred to the dominant undertaking's past experience with antitrust's 'severity'.
[192] See Eilmansberger (2005) 147. This does not prevent the use of intent as a substantive test, as the issue of fault 'must be distinguished from the question of whether the illegality of a given practice should turn on its underlying intent'.
[193] *Hoffman-La Roche* (fn. 109) ECR 499, where the Commission argued that for establishing an abuse 'there is no need to prove an improper act or some factor of a subjective nature or to substantiate immorality'.

'fault' at some level.[194] What is clear is that it does not extend to the knowledge of illegality. Ultimately, such knowledge is a belief which EU competition law is free to consider legally irrelevant.

iii. Motives

The intention in performing an action can be differentiated from the motives for undertaking it. For example, an undertaking's intention to exclude a competitor may be motivated by strengthening a dominant position or simply by distaste for competitors. Anscombe distinguishes between 'intentional action' and 'intentions in acting'.[195] Intentional actions, as stated above, require that the question 'why' in answered in a non-causal manner. Anscombe argues that it is 'intentions in acting' which allows the interpretation of intentional actions, namely answering the question 'why' in the manner of providing reasons. Thus, 'intentions in acting' can be understood as motives. Despite their interpretive value, in criminal law it is usually held that motives are legally irrelevant: if one intends to kill, for example, the reasons for doing so (compassion, spite, passion, etc.) can be considered in setting the sanction but not for finding a murder.[196] Therefore, criminal law separates the intent to commit the action from its motives. In US antitrust, Stucke also separates 'motive for undertaking the action' from the awareness of the action and its consequences, but nonetheless integrates both under the notion of intent.[197] This raises the question of whether the irrelevance of motives in criminal law, or their relevance in US antitrust, also applies to EU competition law.

It is argued that no general statement can be made, one way or the other, about the legal relevance of intentions. The distinction between intent and motives is not useful in EU competition law. Criminal law is concerned with physical actions, so that intent can be circumscribed to the described physical result. In the example of murder, all that appears necessary is to check if the agent was aware and intended that consequence. The ethical character of criminal law also favours a clear-cut rule against the taking of life. In EU competition law, as already remarked, physical actions have little meaning without considering their purpose. This means that the priority is reversed in relation to

[194] This is consistent with demanding intent or negligence for sanctioning, and not strict liability.
[195] See Anscombe (1963) 18-20.
[196] See Wilson (2011) 134-135.
[197] See Stucke (2012) 809.

criminal law: first intention is established, and then the capability of the actions to produce the desired effects is examined. The only intentional actions that interest EU competition law are the ones motivated by Anscombe's 'intentions in acting', which can answer the question 'why' through reasons.

It is also submitted that in EU competition law there is no relevant distinction between the immediate consequences of an agreement or abusive conduct and their motivation as more remote consequences. On the contrary, the importance of understanding actions in terms of strategies is precisely to link all consequences. Under the 'intentional stance', any intended consequence, immediate or remote, is a desire.[198] The only requirement is that motives, in particular if based on internal documentation or statements, are effectively interpreted as being acted and not merely declared. As such, motives should be incorporated in the definition of intent as desires, without any criminal law-inspired distinction with other desired consequences of the action. Nazzini's definition of 'specific intent' does so, by exemplifying the intent in predatory pricing as both the immediate consequence 'to exclude a rival' and the motive 'to enhance or protect [the dominant undertaking's] market power'.[199]

Once motives are understood in terms of beliefs and desires under the 'intentional stance', their legal relevance (or irrelevance) can be defined as needed. It should be noted that this may still be framed under the general irrelevance of motives, as any motive which is relevant can be incorporated into the characterisation of the action according to its purpose or as a conceptually separate justification. This happens in criminal law. For example, the intent to use force against property can be considered robbery (and not criminal damage) if it is motivated by stealing.[200] The motivation to self-defend will also make all the difference in relation to the intent to commit an offence.[201] It seems that one of the reasons why intent is hard to pin down in criminal law is due to motives not yet formalised as offences or justifications being considered as part of intent.[202] EU competition law operates through notions such as 'restriction of competition' and 'abuse of dominance' which, as detailed in Chapter IV (on restrictions of competition) and Chapter V (on abuse of dominance), allow latitude in relation to motives with little need of formalisation.

[198] Akman (2014) 34 fn. 118 also comments, in relation to Stucke's definition, that motives are not differentiated from other desires in the Article 102 case law.
[199] Nazzini (2011) 58.
[200] See Wilson (2011) 471.
[201] See Wilson (2011) 261.
[202] See Wilson (2011) 139.

Thus, the Court finds behaviour anti-competitive or justified according to its motives, framed as the purpose of an agreement or abusive practice, by stating that 'intention' can be relied on. Under Article 101 the Court considered in *BIDS* that the 'the object of remedying the effects of a crisis in their sector' was irrelevant in relation to the reduction of capacity.[203] The Court then makes the general statement that 'an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives'.[204] This appears to exclude the legal relevance of motives. However, as described in Chapter IV (on restrictions of competition), the Court has accepted certain motives as excluding a restriction by object, framed doctrinally as 'commercial ancillarity', without formalising then as objective justifications.[205] Under Article 102, the Court also stated in *Tomra* that it was legitimate to consider the 'motives' of business strategies.[206] As discussed in Chapter V (on abuse of dominance), it is controversial whether the motive to harm competitors should be considered legally relevant. Nonetheless, as with any other belief and desire, the Court has accepted or rejected such relevance according to the circumstances.

3. Conclusion

This chapter showed that intent is relatively easy to conceptualise in EU competition law, mainly due to the economic nature of undertakings. The starting point is the everyday application of 'folk psychology' to interpret and predict a person's intention as a decision to act on beliefs and desires. This is empirically proven, and extends to the majority of the use of intention in a legal context. Further conceptualisation under the 'intentional stance' is useful to show that 'folk psychology' abstracts from the internal workings of how intention is arrived at, interpreting it directly from actions. The 'intentional stance' applies to undertakings, as it does to any other agent considered rational. In fact, it can even be said to apply better. Due to its particularities, criminal law is exceptionally forced to capture a 'state of mind' which might be at odds with a rational interpretation of physical actions. The actions of undertaking under EU

[203] *BIDS* (fn. 25) 21.
[204] *BIDS* (fn. 25) 21.
[205] See Whish and Bailey (2012) 128-130.
[206] *Tomra* (fn. 26) 19.

competition law are easier to interpret, as one can readily attribute them to the beliefs and desires of economic activity. Under the assumption of rationality, if a strategy is not credibly capable to produce the desired effects, it is not a valid interpretation. Furthermore, the (factual) capability to produce effects is also the requisite legal standard of implementation, which is usually presumed and only rarely challenged.

EU competition law has embraced the consideration of undertakings as rational economic actors, but has also indulged in a needless separation between such intent and the purpose of agreements and abusive conduct. It is apparent that when the Court states that an agreement's 'objectives' or an abuse's 'business strategy' must be necessarily be considered that it is referring to undertakings' intent. Nonetheless, the Court insists that its interpretation is 'objective', as if agreements and abusive conduct had a purpose independent from the 'subjective' intent of their creators. No civil court would fail to recognise a contract as its parties' intention, and no criminal court would consider the intent of an act apart from its agent. Only a public law court would interpret undertaking behaviour as if it were a State measure with an autonomous normative content. Agreements and abusive conduct, however, are not normative acts but the expression of undertakings' intent. Thus, it will be seen in Chapter III (on collusion) and Chapter V (on abuse of dominance) that the infringement of Articles 101 and 102 starts with intent which is potentially offensive to the principles of EU competition law.

The case law that undertakings' intent is not necessary factor but can be taken into account may seem like a clever way to admit a discretionary use of intent. It has certainly proven useful whenever the Court wants to reject the legal relevance of certain intent without engaging in much reasoning. Moreover, a limited role of intent also plays to the tests of effects on which an infringement might depend (in addition to intent which is contrary to the principles of EU competition law). However, expressed as it is, this case law undermines the conceptual foundation of anti-competitive behaviour as reflecting undertakings' intent and rationality. The reading of such case law should thus be limited to the (also misguided) identification between intention and internal evidence of a 'state of mind'. This will also settle the debate over 'objective' and 'subjective' intent. As detailed in the chapter corresponding to collusion, restrictions of competition and abuse of dominance, whenever the Court considers what undertakings agreed upon or how they act on the market, it can be said to look at intent.

CHAPTER II

Judging behaviour based on intent

In the previous chapter, intent was defined as an undertaking's legally relevant decision to act on its beliefs and desires. The only general condition for such legal relevance is implementation, to the requisite standard of the capability to produce effects. Implementation is presumed insofar as a credible strategy requires the capability to produce the desired effects, but this presumption can be rebutted when factual developments frustrate a rational expectation. Other than this general condition, legal relevance will depend on the particular conditions set out in the case law. This research will describe how the Court has selected particular decisions, beliefs and desires as relevant (or not) for the production of certain legal effects. For example, in Chapter I (on the concept of intent) it was demonstrated that knowledge of illegality (a belief) is irrelevant for finding an infringement of Articles 101 and 102. Subsequent chapters will examine the role of intent in the main substantive conditions for the application of those provisions. Before doing so, however, this chapter will discuss why intent has normative value for those purposes – in other words, how can behaviour be judged based on intent.

The normative value of intent is better understood in comparison with the alternative of judging behaviour based on effects. This alternative is not clearly spelled out in the Treaty competition provisions, which only mention effects in relation to restriction by object or effect under Article 101(1). Nonetheless, as developed in Chapter IV (on restrictions of competition), the alternative between intent and effects corresponds to the difference between restrictions by object or effect, since restrictions by object are based on the objectives of the agreement and preclude the consideration of its actual or likely effects.[207] Moreover, as discussed in Chapter V (on abuse of dominance), abuses under Article 102 have also been found based on either intent or effects, namely through the tests of specific abuses. That alternative is somewhat obscured when the threshold for anti-competitive effects is set at the same level as for the implementation of intent (the capability to produce effects). As noted in Chapter I (on the concept of intent), the

[207] The forms of collusion stated in Article 101 will be referred to as an 'agreement' in this chapter.

effects required for such implementation are not the same as anti-competitive effects.[208] The present chapter will show that this reflects a different judgment: in one case it is the intent which is considered anti-competitive (even if it requires effects for implementation), in another the effects.

The alternative between judging behaviour based on intent or effects has also been misunderstood by the trend which promotes the latter under a so-called 'effects-based approach'.[209] The accepted narrative goes that the Commission applied a 'formalistic' approach until its 'modernisation', when it began using a more economics-based approach directed at anti-competitive effects on consumer welfare.[210] Such 'modernisation' began with the Commission's assessment of agreements under Article 101 and culminated in the Enforcement Guidance on Article 102.[211] This narrative sometimes overlooks that 'modernisation' did not greatly affect the case law of the Court, leading the Commission to significantly readjust its position in the Enforcement Guidance on Article 102.[212] 'Modernisation' seems to have nonetheless captivated a large section of the doctrine, which as described throughout this research, both advocates and interprets the case law as requiring anti-competitive effects to find an infringement of Articles 101 and 102.[213] As described in the present chapter, such an 'effects-based approach' has proven to be the biggest obstacle to recognising the normative value of intent. Against this approach, Mestmäcker, speaking in relation to abuse of dominance, states that:

> '[t]his discourse develops its own advocatory terminology: an economic approach equals mainstream economics that in turn means neoclassical welfare economics which equals the [Article 102] purpose of consumer harm which in turn defines the effects-orientated application of [Article 102]'.[214]

It is thus necessary to break the doctrinal connection between economics, consumer welfare and effects. Any claim of an exclusive connection between an 'effects-based

[208] The effects for implementation are those which the strategy foresees, while anti-competitive effects are assessed in relation to the market regardless of being anticipated or not. As developed in Chapter IV (on restrictions of competition) and Chapter V (on abuse of dominance), the first do not require market power while the second do.
[209] See Akman (2014) 1, Bailey (2012) 569, Lianos (2009) 20 and O'Donoghue and Padilla (2013) 225.
[210] See Jones and Sufrin (2014) 56-57.
[211] See Whish and Bailey (2012) 52.
[212] An 'effects-based approach' is referred in the Commission press release but not on the Enforcement Guidance on Article 102 itself, which states that effects may be inferred in the 'naked abuses' discussed in Chapter V (on abuse of dominance), see IP/08/1877 and Enforcement Guidance on Article 102 22.
[213] See Whish and Bailey (2012) 201-201 in relation to Article 102. As described in Chapter IV (on restrictions of competition), this position interprets restrictions by object under Article 101 as capturing the risk of anti-competitive effects, see Bailey (2012) 563-64.
[214] Mestmäcker (2011) 44.

approach' and economics can be easily set aside: economics is used in a similar manner when interpreting an undertaking's intent. As discussed in Chapter I (on the concept of intent), intent presupposes economic rationality. Indeed, as also stated there, effects are assessed in relation to practices designed according to undertakings' beliefs and desires. Intention is routinely integrated into effects analysis as the undertakings' 'incentives'.[215] Insofar as economics is a theory that people will act according to those incentives, it can be said to be a theory of intention.[216] Hence, a more economic-based approach to EU competition law obviously extends to the treatment of intent.

This chapter will address the connection between consumer welfare, and indeed the goals of EU competition, and the alternative if judging behaviour based on intent or effects. Gormsen comments that '[o]bjectives and methodology are sometimes intertwined and changing the underlying purpose of a provision may sometimes require a change of methodology as well'.[217] The point is that different effects are relevant according to the different goal of EU competition law.[218] Following an 'effects-based approach', Gormsen does not see intent as an alternative judgment, but as a proxy for effects in relation to the EU competition law goals – in the case of consumer welfare, a flawed one.[219] This assumes that the only normative value in EU competition law comes from its goals. It is true that intent can play a subordinate role by serving as a proxy for effects (more flexibly than Gormsen assumes). However, the present chapter will argue that intent also has an autonomous normative value. If effects are 'intertwined' with EU competition law goals, intent is intertwined with its values.

In essence, this chapter will discuss how an 'effects-based approach' depends on the assumption that behaviour can only be judged on its effects, and that such assumption is disproven by the different judgments made by the case law when dealing with intent. This posits a relatively limited normative claim: no particular type of judgment is preferred, effects or otherwise, only a broader assessment which guarantees the stability of EU competition law in face of competing moral alternatives. The chapter will therefore start by examining the contrast between form and effects, which limits the use of intent to presumptions of effects and associates it with formalism (**1.**). It will then describe how the goals of EU competition all relate to outcomes, so that an 'effects-

[215] See Jones and Sufrin (2014) 57.
[216] Classical economics would focus on perfectly rational intention and behavioural economics on the deviations from this model.
[217] Gormsen (2010) 113.
[218] More specifically, effects on the structure of competition for 'economic freedom' and effects on consumers for consumer welfare, see Gormsen (2010) 113.
[219] See Gormsen (2010) 137.

based approach' is used to discuss, advocate and prioritise such goals (**2.**). The chapter will finally analyse how behaviour is additionally subject to non-consequentialist moral judgments, which apply to intent and guarantee its autonomous normative (**3.**).

1. Formalism

This section will discuss how the alternative of judging behaviour based on intent or effects does not influence the degree of formalism of EU competition law. It is common in the doctrine to contrast form and effects, implying that any other substantive criterion but effects risks leading to formalism – with apparent negative consequences for the use of intent.[220] For example, Whish and Bailey comment that:

> 'One of the most common complaints about Article 102 is that the Commission and the EU Courts apply it in too formalistic manner. This criticism can be articulated in various ways. One is the argument that some practices appear to be unlawful *per se*, but that *per se* rules are inappropriate for behaviour such as price cutting and refusals to deal which may, depending on the facts of a particular case, be pro-competitive, anti-competitive, or neutral. Another way of voicing the same criticism is to argue that the Commission and the Courts often fail to demonstrate how a particular practice could have significant effects on the market: too often they fail to articulate a convincing theory of economic harm and/or to produce evidence that adverse effects would follow from the practice under investigation'.[221]

Only the first of the criticisms formulated by Whish and Bailey – which does not mention effects – corresponds to formalism in the technical sense.[222] When behaviour is automatically considered anti-competitive by the operation of certain rules, as the *per se* abuses referred, many facts of the particular case are by definition omitted from consideration. If such facts prove to be relevant for the behaviour's competitive character, there is indeed formalism. This opens the discussion on whether such rules are appropriate (which Whish and Bailey engage in after the above quote).[223] Their second criticism that there might not be 'effects on the market', however, does not technically correspond to formalism. Whether behaviour is judged based on effects is a

[220] See Jones and Sufrin (2014) 56-57 and O'Donoghue and Padilla (2013) 225.
[221] Whish and Bailey (2012) 199.
[222] The present discussion will not consider 'formalism' in legal philosophy (as a school of thought connected to legalism) or practical (as a reaction to imperfect knowledge or resources) senses.
[223] See Whish and Bailey (2012) 199-200.

substantive choice. Behaviour could instead be judged on other criteria, such as the intent or the size of the undertakings involved.[224] If these criteria ignore facts that are competitively relevant, as formalism does, it is because they are the wrong criteria. Thus, in order to consider the two criticisms as the same, Whish and Bailey must assume that the only right criterion is effects.

Contrasting form to effects is therefore a rhetorical argument for an 'effects-based approach'.[225] If form is opposed to effects, and effects are opposed to intent, then intent must be formalistic. Following this logic, Nazzini argues for the use of intent but extensively considers the risk of 'systemic false convictions' and 'systemic false acquittals'.[226] Such errors of over- and under-inclusion, however, are not particular to intent or any other substantive criterion. As developed below, they are commonly associated with the distinction between rules and standards. By assuming that the only relevant criterion is effects, an 'effects-based approach' also admits to the use of effects-based rules. Hence, such rules can lead to formalism of the first sort described by Whish and Bailey, as discussed below in relation to the example they give of abusive rebates. This shows that formalism is not an obstacle to judging behaviour based on intent. This section will start by examining the distinction between rules and standards, and its relation to optimal level of enforcement (i). It will then consider how the contrast between 'form or effects' is in reality the opposition between a standard of actual or likely effects and presumptions of effects (ii).

i. Rules and standards

The distinction between rules and standards is well developed in legal technique.[227] Kaplow defines this distinction based on 'the extent to which efforts to give content to the law are undertaken before or after individuals act': a rule determines the factors on which it can be relied on *ex ante*, while a standard leaves factors to be considered by the adjudicator *ex post*.[228] Thus, rules may ignore certain facts of a particular case if they

[224] See Jones and Sufrin (2014) 56.
[225] See Jones and Sufrin (2014) 57-58, O'Donoghue and Padilla (2013) 224-225 and Whish and Bailey (2012) 193.
[226] See Nazzini (2011) 201 and 211.
[227] See Kaplow (1992) 559.
[228] Kaplow (1992) 559-560, giving the example of a rule imposing a certain speed limit and a standard prohibiting driving at an 'excessive' speed. See also Lianos (2013) 58.

are not among those predefined, as stated by Whish and Bailey above, while a standard may adjust to integrate such facts if it finds them relevant. Rules, however, are easier for individuals to anticipate and adjust their behaviour accordingly.[229] Other aspects should be highlighted in relation to this distinction. First, rules and standard are considered in their pure form but this does not correspond to reality, as legal provisions almost always mix the two.[230] As discussed below for Articles 101 and 102, a rule might operate based on concepts defined by standards, and certain factors considered by standards might be subject to rules. Second, the application of binding precedent may turn standards into rules.[231] The present research focusing on judicial assessment, rules and standards will be considered as the Court's decision to interpret the conditions of Articles 101 and 102 as such.

Rules and standards are commonly associated with errors of over- and under-inclusion.[232] Often referred to as false positives and negatives in EU competition law, errors of over-inclusion would disregard factors showing the pro-competitive or neutral character of behaviour, while errors of under-inclusion would not consider factors relevant for the anti-competitive character of behaviour.[233] One way to look at such errors is that they are exclusive to rules, and a reason against their introduction, since standards can be adjusted to avoid them. This would involve a trade-off between the flexibility and the correctness of standards against the legal certainty and ease of administration of rules. As Posner describes:

> 'A rule singles out one or a few facts and makes it or them legally determinative. A standard allows a more open-ended inquiry. Rules are generally simpler and cheaper to enforce than standards and provide clearer guidance both to the people subject to them and to the courts that administer them. But they are often either underinclusive or overinclusive, and sometimes they are both at the same time'.[234]

Under this view, rules are by definition over- and under-inclusive. Formalism, in the technical sense, would consist in an overreliance on rules to the point where the gains of legal certainty and ease of administration would no longer compensate those errors. The

[229] Kaplow (1992) 577 focuses on the costs of compliance (incurred whenever there the legal provisions are applied) versus the costs of promulgation (incurred only once, when the legal provisions are enacted) in order to conclude that rules are preferable to standards according to the frequency of application.
[230] See Kaplow (1992) 561-562.
[231] See Kaplow (1992) 577-579.
[232] See Kaplow (1992) 565.
[233] See Jones and Sufrin (2014) 57-58, Monti (2007) 16, O'Donoghue and Padilla (2013) 224-225 and Whish and Bailey (2012) 193.
[234] Posner (2001) 39.

frequency and importance of such errors would therefore serve as a barometer for the appropriateness of employing rules instead of standards.

Another view is that those errors are unrelated to the distinction between rules and standards. Kaplow points out that considering that rules are under- or over-inclusive in relation to standards assumes that rules are simple, operating based on few factors, and standards are complex, considering multiple factors.[235] The correct comparison, however, would be between rules and standards of the same complexity: standards which are *de facto* or conceptually based on the same number of factors as rules. Kaplow then challenges the assumption that rules tend to be systematically simpler than standards.[236] Thus, contrary to normal characterisation of rules and standards, complex rules would be applied to frequent behaviour with recurring characteristics and simple standards to infrequent behaviour with varying characteristics. Kaplow concludes that the choice between rules and standards, and the errors deriving from their respective complexity, are determined by the frequency of the underlying behaviour.[237] This conclusion is useful to understand certain aspects of EU competition law, notably the preference for the use of standards by the Court (infrequent judgments, particular characteristics) and of the Commission for regulatory rules (frequent cases, recurring characteristics). Nonetheless, insofar as it is limited to judicial assessment, as discussed next, it is legitimate to hold that rules tend to be simpler and therefore lead to errors of under and over-inclusiveness in relation to standards.

The point to take from Kaplow's analysis is that standards may be as limited as rules and not always cover all the relevant factors. Moreover, as Monti observes, the risk of error in applying standards is not eliminated because information is always imperfect.[238] This allows considering errors of over- and under-inclusion beyond rules and standards, and in relation to the optimal level of enforcement of EU competition law overall. Thus, Jones and Sufrin do not mention rules in relation to such errors, but simply the presence or absence of competitive harm.[239] It is appropriate to speak of error of over- and under-inclusion when one type of error is more important than another. That is the case of criminal law, where the presumption of innocence expresses a concern to avoid errors of over-inclusion.[240] This concern is also present in US antitrust, where wrong applications

[235] See Kaplow (1992) 565-566.
[236] See Kaplow (1992) 593-596.
[237] See Kaplow (1992) 621-623.
[238] See Monti (2007) 17.
[239] See Jones and Sufrin (2014) 57-58. See also Whish and Bailey (2012) 19.
[240] See Ashworth (2009) 72-73.

are feared to chill competition.[241] Although it is unclear if the same concern has been formalised in EU competition law (beyond criminal law guarantees), its soundness is generally acknowledged.[242] What is clear is that it is not useful to speak of formalism in relation to the optimal enforcement of EU competition law. If both rules and standards lead to errors of enforcement, it is because they are substantively misaligned. Errors of substance must not be confused with errors of form. Hence, formalism is best reserved for the technical sense, described above, of simple rules that are excessively over or under-inclusive in relation to complex standards based on the same substantive criterion.

ii. Form or effects

Since the choice between rules and standards does not reflect the underlying substantive criterion, any combination with intent and effects is possible. As Posner states, 'the domain of the rule may depend on the same factors that would determine legality under a standard'.[243] This logically means that effects are just as prone to formalism as any other substantive criterion. Such a conclusion must inform the reading of doctrinal statements contrasting 'form or effects'.[244] Form would signify 'the form that the agreement or conduct takes, or the size or similar characteristic of parties to a merger'.[245] Formalism would result from undue presumptions that these factors 'are bound to have an anti-competitive effect'.[246] As with any rule, formalism results from the comparison with a standard. This standard would be 'actual or likely anti-competitive effects', what is described in the doctrine as an 'effects-based approach'.[247] However, one can observe that 'effects-based approach' is a misnomer if limited to the referred standard. These authors oppose rules presuming effects to a standard of actual or likely effects. Both depend on the same substantive criterion: effects. Therefore, both fall under an 'effects-based approach'. These authors are not contrasting 'form or

[241] See Whish and Bailey (2012) 194.
[242] See Whish and Bailey (2012) 194.
[243] Posner (2001) 39.
[244] See Jones and Sufrin (2014) 56-57, Lianos (2009) 20-21 and O'Donoghue and Padilla 225-226.
[245] Jones and Sufrin (2014) 56.
[246] Jones and Sufrin (2014) 57. O'Donoghue and Padilla 225 also state that rules are appropriate when 'there is no point in wasting court or regulatory resources in investigating its effects'.
[247] Jones and Sufrin (2014) 47 and O'Donoghue and Padilla 225.

effects': they are referring to the distinction between rules and standards under the substantive criterion of effects.

Some authors, inspired by US antitrust, have applied this distinction to restrictions by object and effect under Article 101(1).[248] Under US antitrust, *per se* violations correspond to rules and the 'rule of reason' (confusingly) to a standard.[249] If applied to Article 101, this would clear the way for an 'effects-based approach'. It is assumed that since restrictions by effect involve a standard, restrictions by object must involve rules.[250] However, this assumption does not hold. The case law on Article 101(1) does not include a typology of prohibited agreements similar to *per se* violations in US antitrust. The Court defines restrictions by object as injurious to normal competition 'by their very nature' – a clear standard.[251] The Court has further stated that in order to find a restriction by object 'regard must be had to the content of its provisions, its objectives and the economic and legal context' – also standards.[252] The reference to 'objectives', as discussed in Chapter I (on the concept of intent), represents the intent of undertakings. It is possible to identify certain types of intent which have been considered restrictive by object, framed by Whish and Bailey under an 'object box'.[253] Precedent can turn standards into rules. Nonetheless, as detailed in Chapter IV (on restrictions of competition), the Court has not let the case law solidify around types of intent, like price-fixing and market-sharing, by also including many instances where such objectives were not decisive in light of the certain economic and legal context. Since context is determined *ex post*, the Court has preserved restrictions by object as intent-based standards.

Claims of formalism under Article 101 do not reflect the Court's case law, and can instead be traced to Commission practice. Pre-'modernisation', the Commission applied a wide criteria to find an infringement of Article 101(1). As Jones and Sufrin describe, the Commission considered any limitation of the parties' freedom or interference with market integration as restrictive by object.[254] Post-'modernisation', the Commission has

[248] See Whish and Bailey (2012) 121.
[249] Posner (2001) 39 comments: 'It is conventional to distinguish between practices that are "per se" violations of antitrust law, such as horizontal price fixing […] and those that are tested by the Rule of Reason and therefore condemned only if found to interfere with competition unreasonably. These are not illuminating terms. What they gesture at is the distinction, fundamental in law, between a rule and a standard'.
[250] See Bailey (2012) 565-568.
[251] *Allianz Hungária* (fn. 103) 35.
[252] *Glaxo* (fn. 28) 58.
[253] See Whish and Bailey (2012) 124.
[254] See Jones and Sufrin (2014) 195-195.

considered that restrictions by object are certain agreements presumed to have anti-competitive effects.[255] This change appears to be the origin of the contrast between 'form and effects', with previous practice deemed formalistic.[256] However, it was precisely against such practice that the Court established the above referred standard for restriction by object. Furthermore, it is doubtful if that practice could even be qualified as formalist in the technical sense. 'Modernisation' appears to have changed the substantive criterion employed by the Commission to effects, and not changed a rule into a standard.[257] On its face, the Commission's current position is more formalist, since it openly employs presumptions of effects. As discussed in Chapter IV (on restrictions of competition), if such presumptions were applied by the Court it would not consider the economic and legal context. Nonetheless, those presumptions remain as unrepresented in the case law as the Commission's pre-'modernisation' practice was.

The issue of formalism in relation to effects is more acutely felt under Article 102. Contrary to the case law under Article 101, the Court has developed a typology of specific abuses of dominance. As set out in Chapter V (on abuse of dominance), the tests of specific abuses are either intent or effects-based. Some of these tests include rules, and therefore by definition are open to accusations of formalism. It is interesting to note is that such claims have been levelled, not at the use of intent, but of effects. Thus, Whish and Bailey illustrate the existence of *per se* abuses with the case law on rebates.[258] The case law is described as having 'developed along formalistic lines'.[259] Hence, the *per se* abuse would be over-inclusive, and capture pro-competitive effects.[260] However, as discussed in Chapter V (on abuse of dominance), the case law on rebates is expressly built around 'exclusionary effect'.[261] The Court does presume such effects, but not even then does it consider the intent of dominant undertaking.[262] The case law analyses the effects on the freedom of choice of distributors, and then extrapolates this into exclusionary effects. Rebates are effects-based *per se* abuses. Yet, Whish and Bailey contrast them to an 'effects analysis' exemplified by the Commission's position

[255] See Communication from the Commission – Guidelines on the application of [Article 101(3)] OJ C 101, 27/04/2004, p. 97 ('Guidelines on Article 101(3)') 21.
[256] See Jones and Sufrin (2014) 196.
[257] This does not consider the application of prohibited clauses in Commission regulation, which are indeed formal rules.
[258] See Whish and Bailey (2012) 199-200.
[259] Whish and Bailey (2012) 728.
[260] See Whish and Bailey (2012) 728-729.
[261] See Case C-95/04 P *British Airways* [2007] ECR I-2331 77.
[262] As also referred in Chapter V (on abuse of dominance), when the Court prohibits loyalty rebates it uses an intent-based test, but in that situation it does not presume effects – it simply bans these rebates as legitimate competition. This might cause some confusion with the 'fidelity building' effect also stated in the case law, but as with any effects-based standard it does not have to be intended.

in the Enforcement Guidance on Article 102 of focusing on practices 'likely to have seriously anti-competitive effects'.[263] As such, as with the 'form or effects' discussed above, Whish and Bailey are in reality contrasting rules presuming effects to a standard of actually likely effects.

The case law on Articles 101 and 102 thus shows that formalism does not stem from the absence of an 'effects-based approach', but from the use of rules within that approach. Those rules can use intent as their trigger, as would be the case if agreements like price-fixing or market-sharing were presumed to be restrictive by object (as seen above, they are not). They can however rely on other triggers, like the size of undertakings in mergers or even other effects in abusive rebates. What is important in rules is not their trigger, but the substantive criterion they attempt to capture. It is this criterion that allows rules to be compared with standards in order to assess the frequency and importance of errors of over- or under-inclusion. Thus, the doctrine rightly compares presumptions of effects with actual or likely effects. An issue arises, however, when the case law employs other substantive criteria. When the Commission used limitation of the freedom of the parties to extend the scope of Article 101, this was considered formalistic in comparison with effects. In the same manner, Bavasso considers that the use of intent might lead to errors of over- or under-inclusion under Article 102 in comparison with the 'likelihood of competitive harm'.[264] In those situations, the doctrine is comparing apples with pears. Supposed errors of under and over-inclusion are the result of purposely using a different substantive criterion.

The contrast between 'form or effects' says more about the doctrine than it says about the case law. Two aspects stand out. The first is that authors assume that the only valid substantive criterion is effects, since the other option is 'form' understood as the presumption of anti-competitive effects. However, as discussed in Chapter IV (on restrictions of competition) and Chapter V (on abuse of dominance), both restrictions by object and certain types of abuse are based on intent without involving any presumption or risk of anti-competitive effects. The second is the preference given by authors to standards over rules, to the point where the standard of actual or likely anti-competitive effects is synonymous with 'effects'. Whish and Bailey comment that there is 'an increasing intellectual consensus against the application of *per se* rules' under Article 102.[265] This willingly abdicates from the legal certainty and ease of application that

[263] Whish and Bailey (2012) 200.
[264] Bavasso (2005) 618.
[265] Whish and Bailey (2012) 200.

rules provide. Posner has stated in relation to US antitrust that 'no responsible person favours a legal regime of just rules or just standards, but there is a large middle range in which the choice of a rule over a standard depends on a policy judgment rather than an exercise of logic'.[266] The doctrine in EU competition law, however, appears to disagree.

2. The goals of EU competition law

This section will analyse the connection between the goals of EU competition law and an 'effects-based approach'. Under such approach, as just seen in the previous section, authors assume that behaviour must be judged based on anti-competitive effects and that assessing those effects through a standard is preferable to presuming them through rules. This 'effects-based approach' has been the foil of intent in EU competition law. Under it, intent can only serve as a proxy for effects – and an imperfect one at that. Hence, the doctrinal debate on intent has been limited to admitting it in situations where it is safe to presume anti-competitive effects or rejecting it as either misleading or unnecessary for that purpose.[267] Without rejecting that intent is sometimes used as a proxy for effects, it is somewhat surprising that authors have not considered that it may also be used to judged behaviour autonomously. Other fields of law do so, in particular criminal law in relation to inchoate offences.[268] This oversight could result from the misconception, described in Chapter I (on the concept of intent), that undertakings' intent is different from the purpose of agreements and abusive conduct. However, such purpose could also be judged independently of effects. A discriminatory purpose of a Member State measure is enough to offend free movement provisions.[269] Even so, finding an abuse of dominance based on the intent to prevent parallel trade has been criticised for not taking effects into account.[270]

This section will show that the doctrine's fixation on effects can be traced to the goals of EU competition. Those goals will be considered without taking a position on which are valid or should be given priority. As remarked in the introduction to this research, this runs largely counter to the approach followed in the doctrine. The legacy of the

[266] Posner (2010) 179.
[267] See Nazzini (2011) 63-65 and Akman (2014) 5-7.
[268] As Ashworth (2009) 441 quotes, 'intent becomes the principal ingredient of the crime'.
[269] See Barnard (2010) 80.
[270] See Akman (2014) 23.

Chicago School is the always-present concern that competition law needs to define or correct its goals or else lead to unacceptable errors of over-inclusion. That discussion is not the object of the present research. It may seem that little could be said without engaging in it; however that is not the case.[271] Whatever the goal – market integration, consumer welfare, efficiency, the competitive process or public policy concerns –, it will be shown below to have been interpreted as attempting to achieve or favour a certain outcome. The connection with effects is evident.[272] Judging behaviour according to effects is judging it against a goal, and choosing the relevant effects is awarding priority or balancing goals.

EU competition law can therefore be said to be 'consequentialist', that is to say, to make its normative properties depend on outcomes.[273] Consequentialism is a philosophical current that developed by relaxing the claims of classic utilitarianism of Bentham and Mills, notably that outcomes should be assessed in hedonistic terms (of pleasure and pain).[274] Thus, consequentialism includes all welfare criteria employed by the several modern versions of utilitarianism. The concern of consequentialism for real outcomes, instead of those intended (foreseen or desired), drives the wedge between the use of intent and an 'effects-based approach'. As such, this section will start by showing that the goals of market integration, improving consumer welfare and preserving the competitive process have been defined in consequentialist terms, and that public policy concerns have been discussed in the same way (i). It will then examine the reasons why the doctrine has adopted an 'effects-based approach', including the preference of assessing effects through a standard and not rules (ii).

i. Consequentialist goals

The first goal to be considered is that of market integration. Article 1 of the Treaty on the EU ('TEU') declares that Member States confer competences on the EU in order 'to attain objectives they have in common'. Thus, the EU project is defined in relation to achieving certain outcomes. The aim of the EU, as stated by Article 3(1) TEU, is 'to promote peace, its values and the well-being of its people'. Competition law is

[271] Also departing from the goals of EU competition law, see the comparative institutional analysis of Lianos (2013) 51.
[272] As stated by Monti (2007) 22, effects provide a realistic and precise benchmark to test goals.
[273] See Sinnott-Armstrong (2014) Introduction.
[274] See Sinnott-Armstrong (2014) Section 1.

particularly concerned with the objective, stated in definite terms in Article 3(3) TEU, that the EU 'shall establish an Internal Market'.[275] The case law has always considered that competition law is necessary for the functioning of the internal market, and has continued to do so under the TEU.[276] For present purposes, it is enough to mention the instrumental role generally acknowledged to competition law in achieving market integration.[277] Insofar as the Internal Market is an outcome, the goal of market integration can be understood as consequentialism.[278] As Whish and Bailey describe, EU competition law prevents the isolation of national markets and encourage trade by 'levelling the playing field'.[279] This is similar to the market access guaranteed by the Treaty's free movement provisions.[280] The case law is thus interpreted as prohibiting behaviour preventing the objective of 'achieving the integration of national markets'.[281]

Another natural fit with consequentialism is the goal of improving consumer welfare. This goal can be seen as EU competition law's contribution to the 'well-being' stated in Article 3(3) TEU.[282] The Commission has privileged the goal of consumer welfare in its 'modernisation'.[283] The Court provided little support for this move, notably stating in *Glaxo* that the aims of EU competition law are wider and that, as such, a negative effect on consumers was not required to find a restriction by object under Article 101.[284] Nevertheless, the reasoning of the Court has been that the protection of the competitive process ultimately leads to improving consumer welfare, and under that reasoning the Court has made several references to consumer welfare in its case law on Article 101 and 102.[285] There is a heated debate on what to understand by 'consumer welfare': consumer surplus, efficiency, total welfare, or societal benefit.[286] The notion of consumer welfare can be placed anywhere between a direct, narrow, short-term benefit

[275] Previous versions of the Treaties stated that this involved 'a system ensuring that competition in the internal market is not distorted'. The TEU relegates this reference to Protocol No. 27 on the Internal Market and Competition, but since the protocol is considered an integral part of the TEU this appears to have had little impact, see Lianos (2013) 42.
[276] See *TeliaSonera* (fn. 69) 20-21.
[277] See Jones and Sufrin (2014) 39. A market integration goal is generally accepted, the only debate being its possible conflict with consumer welfare, see Lianos (2013) 41-42 and Nazzini (2011) 28-29.
[278] See Lianos (2013) 41.
[279] Whish and Bailey (2012) 23.
[280] See Barnard (2009) 103.
[281] *Glaxo* (fn. 28) 61.
[282] *TeliaSonera* (fn. 69) 22 mentions that competition law ensures 'the well-being of the European Union'.
[283] See Jones and Sufrin (2014) 41-46 and Whish and Bailey (2012) 19.
[284] *Glaxo* (fn. 28) 63.
[285] See Jones and Sufrin (2014) 48.
[286] See Lianos (2013) 15-19. The debate in US antitrust, although similar, tends to gravitate between consumer surplus and total welfare, see Blair and Sokol (2012) 47.

and an indirect, wide, long-term improvement.[287] Nevertheless, whatever the notion of consumer welfare, it is clear that it aims to achieve a certain outcome. Therefore, consumer welfare falls under consequentialism – a notion used precisely to cover several notions of welfare.

The protection of the competitive process can also be understood as a separate goal different from the indirect consumer welfare. The Court has stated that the Treaty competition provisions aim to protect 'the structure of the market and, in so doing, competition as such'.[288] The Court's reasoning is that this is an indirect means to improve consumer welfare, as already noted, with the case law contrasting direct and indirect damage to consumers.[289] However, other times the case law makes no such connection, opening the way to a particular interpretation that competition is being protected as 'an institution' – the expression used by AG Kokott in the Opinion in *British Airways*.[290] This has been associated with the notion of freedom of competition under 'Ordoliberalism'.[291] Korah comments that:

> 'The Ordoliberals accepted the view that one of the functions of competition is to produce an efficient allocation of resources for the benefit of consumers. In contrast to many economists today and recent statements form the Commission, however, the Ordoliberals did not accept that "good outcomes" were the sole purpose of competition law. They were concerned also about the accumulation of political power by the state and private firms, which they feared would result from inadequate competition'.[292]

The issue of historic and actual Ordoliberal influence over EU law is a contentious point.[293] For the present purposes, however, it is only necessary to analyse whether the protection of the competitive process deviates from consequentialism. Ordoliberalism is useful in this regard because it eschewed prioritising 'good outcomes' of efficiency and welfare (since it rejected the central planning of the economy) and placed an emphasis on freedom of competition.[294] This can be compared with the protection of the competitive process in EU competition law regardless of any actual influence of

[287] See Odudu (2006) 22 and Nazzini (2011) 49-50.
[288] *Glaxo* (fn. 28) 63.
[289] See Jones and Sufrin (2014) 46. The distinction is particularly useful insofar as it applies to exploitative and exclusionary abuses, as shown by *Continental Can* (fn. 145) 12.
[290] Opinion *British Airways* (fn. 261) 225.
[291] See Jones and Sufrin (2014) 48.
[292] Korah (2011) 8. Whether this is historically accurate is not as relevant as Korah's characterisation from the point of view of Ordoliberal influence of EU competition law. For an historical and conceptual analysis of Ordoliberalism see Mestmäcker (2011) 39-44.
[293] See Gormsen (2010) 98-101 and Whish and Bailey (2012) 22.
[294] This does not mean that Ordoliberalism was unconcerned with efficiency and consumer welfare. As Lianos (2013) 26-27 notes, it simply viewed them in an integrated in a competitive market order (supporting an indirect consequentialist approach to consumer welfare).

Ordoliberalism. First, the objective of Ordoliberalism was to preserve freedom of competition as an instrument against economic power. This is considered consequentialist by Lianos, as it aims to safeguard well defined outcomes: non-concentrated markets and economic democracy.[295] Second, Ordoliberalism advanced the notion of an 'economic constitution'. At one level, this notion promoted a set of rules for the competitive process which economic agents could rely on as not being conditional upon an individual analysis of each case.[296] This, however, merely signals a preference for rules over standards. At another level, the 'economic constitution' included private law rights. Such rights can be said not to be consequentialist, since their exercise is not linked to any outcome. Hence, the most useful question to be drawn from Ordoliberalism is whether EU competition law protects the competitive process by granting similar rights to market participants.

Some authors have discussed whether freedom of competition leads to rights in relation to competitive process. Mestmäcker holds that freedom of competition concerns the rights of property, contractual freedom and 'free access to professional and business activities against legislative or administrative interference'.[297] Competition law governs the exercise of those rights in order to 'participate in competition', but Mestmäcker does not mention rights-based claims in relation to the competitive process. In contrast, Nazzini formulates a 'right to participate in the market, as a consumer or as a competitor'.[298] For Nazzini, this is another facet of the 'right not to suffer any limitation of market opportunities resulting from anti-competitive behaviour'.[299] However, there is a procedural and substantive difference. Undertakings have the right to adequate remedies against anti-competitive behaviour, as well as several rights in associated administrative procedures.[300] A different issue is undertakings having a substantive claim under EU competition law such as the right to participate in the market as a competitor. Gormsen goes even further, by stating that the case law has 'characterised free competition as a fundamental right'.[301]

[295] See Lianos (2013) 26.
[296] See Lianos (2013) 27-28.
[297] Mestmäcker (2011) 46.
[298] Nazzini (2011) 21. Nazzini also starts from the basis that 'competition is a constituent element of the definition of economic freedom'. Therefore, it might be that the right quoted does not involve a substantive competitive claim. The language used – as it is characteristic of rights – nonetheless invites such claim.
[299] Nazzini (2011) 21.
[300] See Case C-453/99 *Courage* [2001] ECR I-6297 24.
[301] Gormsen (2010) 103-104, but then arguing that there is no such fundamental right since the Court has balanced freedom of competition against non-fundamental rights such as intellectual property.

The crucial difference in relation to freedom of competition is between the notions of right and interest. The case law quoted by Gormsen does not mention a freedom of competition as a fundamental right, but as a 'fundamental principle'.[302] It is true that some principles recognised by the Court have led to rights, such as the fundamental freedoms and fundamental rights.[303] However, the Court appears to have carefully avoided the same for freedom of competition. Its status as a principle is sufficient to influence the interpretation of Articles 101 and 102, as described below. No infringement of those provisions has however relied on a right to participate in the market. As the Court has repeatedly stated, such provisions protect the 'interests' of competitors.[304] This means that access to the market may be guaranteed in the interest of competitors, for example by prohibiting rebates foreclosing access to distributors or refusals to deal indispensable inputs. However, as described in Chapter V (on abuse of dominance), this is connected to particular anti-competitive effects. Undertakings do not have the right to participate in the market stated by Nazzini, notably of forcing incumbents to lower market barriers. Similarly, in merger control the interest of third parties is served if a higher market concentration is avoided, but there is no right to a market which is not concentrated. As such, even if it is not understood as indirectly pursuing consumer welfare, the goal of protecting the competitive process can still be considered consequentialist insofar as it pursues outcomes such as rivalry and low market barriers in the interest of competitors.

Whether public policy concerns are integrated in the goals of EU competition law also depends on the definition of consumer welfare.[305] If they are, it is also enough for the present purposes to confirm that they follow the same consequentialist framework as the goals of market integration and consumer welfare. For example, environmental protection is understood as a goal, namely that of preventing or reducing environmental damage.[306] Townley argues that for such public policy concerns to be considered they have to be balanced against their 'impact upon competition'.[307] In addition, Townley considers that 'public policy effects' should be 'costed in some way, or at least be supported by some widely accepted theoretical mode'.[308] Although it is not excluded that public policy concerns may go beyond consequentialism, their consideration under

[302] See Case 322/81 *Michelin* [1983] ECR 3461 113.
[303] See Gormsen (2010) 102.
[304] See *T-Mobile* (fn. 73) 38 and *Glaxo* (fn. 28) 63.
[305] See Townley (2009) 20-21.
[306] See Townley (2009) 124-125.
[307] Townley (2009) 43.
[308] Townley (2009) 43.

EU competition law appears to imply that they are assessed in relation to their outcomes.[309] Thus, there appears to be some consensus about the consequentialism of EU competition law goals regardless of the particular goals.

ii. The advantages of an 'effects-based approach'

Understanding the goals of EU competition law as consequentialist provides a solid explanation of why the doctrine follows an 'effects-based approach'. If the concern is to promote 'good outcomes', as Korah mentions, this naturally leads to 'probable effects on the market as the sole criterion of competition'.[310] It is beyond question that such an approach works for large swathes of EU competition law. Under Article 101(1), restrictions by effect are naturally judged on effects. The exemption provided by Article 101(3) requires the pro-competitive effects therein. Certain abuses under Article 102 include exclusionary effects in their tests, as seen above in relation to rebates. The test in merger control, to 'significantly impede effective competition', is also based on effects.[311] In all those situations intent is subordinate to effects, and the only possible discussion is whether it constitutes an adequate proxy for them. It makes sense that it does, as discussed in Chapter I (on the concept of intent), since effects are assessed in relation to practices designed according to undertakings' intention. Instead of having to establish a causal link for each and every effect, market consequences can be assigned to the practice investigated as long as they fit with its purpose. Intent may be used to interpret actual effects and to predict likely effects.[312] However, it may also be that such effects are also unintended. The present research will not discuss this subordinate role in detail, since it is a mere practical application of an 'effects-based approach'.

Consequentialist goals provide the reason for generalising an 'effects-based approach' to all EU competition law, and not just the referred issues expressly based on effects. As remarked above, some authors assume that effects are the only substantive criterion when contrasting 'form or effects', since they equate 'form' with presumptions of

[309] See Townley (2009) 42.
[310] Korah (2011) 9.
[311] Article 2(3) of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ L 24, 29/01/2004, p. 1 ('Merger Regulation'). See Jones and Sufrin (2014) 1182-1184, discussing the outcomes of the creation of a dominant position and non-coordinated effects.
[312] See Odudu (2006) 120-122, for predicting effects, and Posner (2001) 216, for 'disambiguating an ambiguous practice', namely whether predatory pricing is a tactic to exclude an equally efficient competitor.

effects and 'effects' with the standard of actual or likely effects. Such authors present no substantive alternatives to effects. Consequentialist goals would vindicate this claim insofar as EU competition law would only be concerned with outcomes. Therefore, even if effects are not always expressly stated, they would have to be presumed as the underlying reasoning for judging any behaviour as anti-competitive. This explains the doctrinal references to 'formalism' beyond its technical meaning (of errors of over- and under-inclusion by rules in comparison with standards): the use of substantive criteria unrelated to effects would be normatively vacuous. That use could only be attributed to an unwarranted side-effect of the procedural necessities of a legal system, such as pre-'modernisation' restrictions to contractual freedom in order to bring the maximum number of agreements within the scope of Article 101. Hence the concern expressed by Odudu, also noted in the introduction to the present research, of keeping such 'jurisdictional' issues separated from 'substantive' questions.[313]

If consequentialist goals clearly explain an 'effects-based approach', they do not immediately explain the preference for the standard of actual or likely effects over rules. Philosophically, consequentialists are divided between 'act' and 'rules' consequentialists.[314] As such, rules consequentialists recognise that certain outcomes should not be pursued under a standard. An important factor is the recognition that it is often impossible to assess the consequences of particular acts.[315] This factor is integrated in Hayek's conception of competition as a process of factual discovery, which argues that an economy should not be directed to achieve pre-ordained goals.[316] Yet, in EU competition law, an 'effects-based approach' shows great conviction in being able to judge behaviour according to the standard of its actual or likely effects.[317] Notably, there appears to be no support at all for *per se* abuses under Article 102.[318] This preference is even more striking by being limited to judicial assessment, as the

[313] See Odudu (2006) 98-101. Coherently with this 'effects-based approach', it has already been remarked that Odudu (2006) 22 and 120-122 considers intent as a proxy for effects and argues for a consequentialist goal of efficiency.
[314] See Sinnott-Armstrong (2014) Section 5.
[315] See Sinnott-Armstrong (2014) Section 4.
[316] See Hayek (2002) 13-14 and Mestmäcker (2011) 47-48.
[317] Nazzini (2011) 49-52 is an exception by arguing that the objective of EU competition law is 'long-term social welfare', which suggests rules consequentialism insofar as the tests of abuse referred do not aim to prevent effects which are negative in themselves. As discussed in Chapter V (on abuse of dominance), however, Nazzini does not follow this logic in relation to intent-based tests.
[318] Whish and Bailey (2012) 200.

extensive rule-making which accompanied the Commission's 'modernisation' is not subject to the same bias.[319]

The reason for the preference for a standard of actual or likely effects is doctrinal, and does not reflect a substantive concern. On the side of substantive concerns, it could be argued that it is important to avoid false positives caused by rules in order not to chill competition, which is a sensible concern. However, as noted above what is relevant in this regard is the overall enforcement of EU competition law, not the comparison between rules and standards, since standards can lead to the same false positives by being ill defined or applied.[320] Another sensible argument is that in the past presumptions of effects have shown not to be sophisticated enough or plain wrong.[321] Nevertheless, it is not impossible to formulate adequate rules. For example, above- and below-cost price rules are generally viewed favourably in relation to effects on efficiency.[322] The limitations of those rules derive from the fact that the rules actually established by the Court do not support the interpretation that they only protect as-efficient competitors from exclusion.[323] That is the reason why the doctrine prefers a standard over rules: it provides a more flexible framework to argue and advocate a particular goal by avoiding the formalisation of other substantive criteria under rules. Lianos observes that:

> '[t]he choice of the interpretive strategy is thus of little value other than the realization of the end-state sought, once the goal(s) have been determined. From this perspective, providing the adjudicator the widest margin of discretion is the prevailing strategy, as in any case, the adjudicator should guide the legal process to the "optimal" solution. It is not a surprise that authors advancing the goal of consumer welfare or that of the protection of the consumer and those arguing for a total welfare approach and economic efficiency agree on the rule of reason and different forms of balancing as their preferred strategy for implementing competition law'.[324]

[319] The Commission's use of rules corresponds to the conclusion by Kaplow (1992) 621-623 that rules are more adequate than standards when applied more frequently. However, certain areas of the law are as often applied by the Court as by the Commission, notably Article 102. As the interpretation of the law to be applied in the EU, it could also be argued that the Court's case law is frequently applied.

[320] Two examples raise doubts over whether false positives are actively being discouraged in relation to the standard of effects: first, as discussed by Jones and Sufrin (2014) 1037-1039, the Commission's economic assessments are subject to limited judicial review, and second, as observed in Chapter V (on abuse of dominance), the low threshold of the capability to produce effects is sometimes employed under Article 102.

[321] Whish and Bailey (2012) 728-729 argue that 'form-based rules are not sophisticated enough' to deal with rebate systems under Article 102, and that actual or likely effects should be demonstrated.

[322] See O'Donoghue and Padilla (2013) 231.

[323] As discussed in Chapter V (on abuse of dominance), see O'Donoghue and Padilla (2013) 231-232.

[324] Lianos (2013) 52.

As discussed above, the difference of standard in relation to rules is the definition of the relevant factors *ex post*. This makes standards easier to change, since the relevant factors can be adapted to the prevalent view at the time of their application.[325] It is the doctrine that sets this view. Thus, an 'effects-based approach' is more than a position which is theoretically coherent with consequentialist goals: it is an active program for the doctrine to influence practical adjudication. This can be observed by how the goal of consumer welfare featured in the doctrinal debate, notably on the side of Bork and the Chicago School, well before it was appropriated by the Commission's 'modernisation'.[326] An 'effects-based approach' allowed the Commission to do so without changing its formal application of EU competition law. All that was necessary was to start assessing actual or likely effects on consumer welfare. Those that favour other goals merely propose that the Commission does likewise, as seen above in relation to public policy concerns, but in relation to other effects.

This perspective sheds light on the judicial reaction to the Commission's stated change of goal in 'modernisation'. Since restrictions by object involve a standard of anti-competitive nature, as discussed above, it was easy for the General Court to support this change of goal in *Glaxo*. In contrast, *per se* abuses do not lend themselves to this re-interpretation, hence their doctrinal rejection and the Commission's application of a standard of 'anti-competitive foreclosure' in the Enforcement Guidance on Article 102.[327] The Court resisted both of these changes, as detailed in Chapter IV (on restrictions of competition) and Chapter V (on abuse of dominance). The answer of the doctrine, as noted above, is to attribute this to formalism. However, as the doctrine has convincingly argued, under an 'effects-based approach' there is no benefit to such formalism. If the Court were to pursue consequentialist goals it would be at the forefront in accepting a standard of actual or likely effects.[328] The use of substantive criteria other than effects is normatively puzzling. An 'effects-based approach' provides a coherent explanation of the normative character of EU competition law and a plan to advance it. However, it is unable to provide an explanation for the deviations from that plan which patently occur.

[325] See Kaplow (1992) 616.
[326] See Bork (1993) 9, following a first edition in 1978.
[327] Enforcement Guidance on Article 102 19.
[328] Under this logic, the adoption of rules would tie it to a balancing of goals which may become outdated, see Lianos (2013) 52.

3. Moral judgments of intent

This chapter will link the normative role of intent in EU competition law to moral judgments. For the purposes of the present research, the expression 'moral' reflects the questions engaged by moral philosophy, namely those dealt with by its branch of normative ethics: why actions are considered right or wrong. This is naturally limited by the scope of the present research, so that the moral judgments concerned are the judicial assessments of whether competitive behaviour is right or wrong in light of EU competition law. It is not, as stated in the introduction to this research, an attempt to formulate a moral theory of judicial decision-making. The purpose is simply to use the contributions of moral philosophy in order to better understand the case law. Some, like Posner, see this as a weakness by importing another set of controversies.[329] However, as also set out in the introduction, it is possible to avoid this by keeping to larger trends and their salient features. The usefulness of this approach has already been proven by allowing EU competition law goals to be framed as consequentialist, since consequentialism is one of the main approaches to normative ethics.[330] What those goals allow is to judge behaviour as right or wrong according to the resulting outcome. In that situation normativity lies with effects and intent can only play a subordinate role. This section will consider the situations where behaviour is judged according to intent, granting it an autonomous normative value.

Although the EU sets out to achieve certain aims, including those represented by EU competition law goals, it is also governed by values. Article 3(1) EU refers to values together with well-being, and those values are stated in Article 2 EU as including freedom and equality. Rather than attempting to interpret these values directly into EU competition law, what is important is to take an ethical background which is wider than consequentialism. An ethical background is sometimes associated with the notion of 'fairness', omitted from the goals of EU competition law above despite sometimes being referred to in that capacity.[331] Fairness can indeed be understood as consequentialist insofar as it pursues public policies such as the protection of small

[329] See Posner (1990) 166.
[330] Therefore, contrary to what it may appear, even goals like efficiency are 'moral' insofar as they can allow behaviour to be judged right or wrong. The conflict discussed by Stucke (2005) 445-446 between efficiency and morality derives from his adoption of a virtue-based morality, as noted below.
[331] See Nazzini (2011) 21-24.

undertakings or the redistribution of income.[332] However, fairness can also involve a non-consequentialist judgement of intent. Stucke describes how price gouging is considered unfair, for example a raise in the price of snow-shovels after a snowstorm, while similar outcomes of consumer loss are admitted in normal situations of increased demand.[333] Although this can be rationalised as the intent to profit from exceptional unfavourable situations being unfair, in other situations unfairness is used as *non-sequitur* for the kind of intuitive judgments addressed below. Hence, the many connotations of fairness – including, in addition, the field of law of unfair competition and the reference in Article 101(3) to a 'fair share' – do not recommend its use in the present research, which will try to avoid it.

A better notion for the moral judgment analysed in this section is Dworkin's notion of 'principles', which he contrasts with 'policies'.[334] A policy 'sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)'.[335] This corresponds to the consequentialist goals of EU competition law as described above. In contrast, a principle 'is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality'.[336] This corresponds to the judgments of intent which will be examined below. Dworkin associates the judicial function more to principles than policies, of which the Court's case law is a good example: the discourse is one of principles previous established, not desirable outcomes.[337]

This section's role is part descriptive, part normative. It will start by describing to two other major approaches to normative ethics besides consequentialism – deontology and virtue ethics – and show how certain principles applied by the case law reflect them (i). This description will extend to how the 'doctrine of double effect' uses intent to limit the application of consequentialism to harm to competitors and collusion (ii). This will lead to the normative part, starting with how the notion of 'reflective equilibrium' is desirable for the stability of the case law (iii). The section will then conclude that the

[332] See Lianos (2013) 31 and Whish and Bailey (2012) 21.
[333] Stucke (2012) 834.
[334] See Dworkin (1967) 23.
[335] Dworkin (1967) 23.
[336] Dworkin (1967) 23. Dworkin mentions that the distinction can be collapsed, notably by the utilitarian thesis that 'the principles of justice are disguised statements of goals'.
[337] See Lianos (2013) 51. Interestingly, Dworkin (1967) 28 refers to restraints of trade in US antitrust as involving the principle whereby 'a court must take into account a variety of other principles and policies in determining whether a particular restraint in particular economic circumstances is "unreasonable"'.

normative value of intent is guaranteed by the 'reflective equilibrium' between competitive intuitions and paradigms representing the plurality of normative views of EU competition law (iv).

i. Deontology and virtue ethics

While the goals of EU competition law allow much of the Court's case law to be interpreted from a consequentialist perspective, namely standards of actual or likely effects and rules that presume effects, such a perspective proves unsatisfactory in relation to other important aspects. Instead of dismissing such aspects as 'formalism', as an 'effects-based approach' was shown to do above, it is worth investigating if they apply principles involving a non-consequentialist moral judgment. A first possible alternative in terms of normative ethics is deontology. Deontology judges behaviour according to moral norms (independently of the outcomes that the behaviour may lead to).[338] Therefore, what is decisive is the agent's intent to follow the moral norm.[339] The quintessential deontological approach is that of Kant, namely by praising good will as unqualified good, by censoring using others as a means to an end, and by judging behaviour according to norms capable of being willed as universal laws.[340] Kantian philosophy has been associated with Ordoliberalism.[341] It was seen above that, although freedom of competition has been recognised as principle, the protection of the competitive process does not grant a right to participate in the market. If such a right existed, the duty to respect it would be deontological, as are the duties to respect to respect the private law rights which Ordoliberals frame under an 'economic constitution'. This does however not exclude that there are other duties in relation to the competitive process which do not rely on those rights.

The case law on parallel trade provides a good example of deontological duty. As detailed in Chapters IV (on restrictions of competition) and Chapter V (on abuse of dominance), the aim to prevent parallel trade is enough to find a restriction by object under Article 101 or an abuse under Article 102.[342] These correspond to a moral

[338] Alexander and Moore (2012) Introduction.
[339] Alexander and Moore (2012) Section 2.1.
[340] Alexander and Moore (2012) Section 2.4.
[341] See Gormsen (2010) 87.
[342] Notably *Consten and Grundig* (fn. 85) ECR 343, where the Court concluded that '[s]ince the agreement thus aims at isolating the French market […] it is therefore such as to distort competition'

judgment of intent. It was stated above that market integration could be interpreted as consequentialist goal, in the sense of achieving the Internal Market. It is true that restrictions to market integration can be assessed through effects, namely obstacles to trade between Member States. Nonetheless, market integration also constitutes a principle which allows judging behaviour with the aim to prevent parallel trade. It could be said that this also involves a presumption of effects. However, the case law has upheld the finding of anti-competitive intent even if it leads to the result, contrary to market integration, of deepening the differences between Member States.[343] Faced with parallel trade which they cannot restrict, undertakings might choose not to invest in the exporting Member State.[344] If market integration were only consequentialist, this outcome should save the behaviour: it is better to have regional price differences than differences in product availability. Under an effects-based reasoning, Monti qualifies the case law as 'irrational'.[345] However, because the principle of market integration is predominantly deontological, behaviour is judged on its intent.[346] In other words, there is an intent-based rule that aiming to restrict parallel trading is simply wrong.

The second alternative to consequentialism is virtue ethics. Instead of judging an action on its outcome or conformity with moral norms, virtue ethics judges it as an expression of a character trait.[347] The most iconic formulation of virtue ethics is that of Aristotle, grounded on excellence, practical wisdom and living well.[348] The guidance that virtue ethics provides is harder to codify than the norms of deontology, but there is great potential in judging intent with reference to virtues and vices.[349] Stucke adopts this approach when defining morality, for the purposes of applying it to US antitrust, as 'rules of conduct associated with certain distinctive psychological and social attributes, such that a person complies with the conduct to achieve virtue and avoid vices'.[350] One area of the case law which is hard to interpret as consequentialist but expresses virtue

[343] See Motta (2007) 23.
[344] In Cases C-468-478/06 *Sot. Lélos kai* [2008] ECR I-7139 the Court partially admitted this argument, as discussed in Chapter V (on abuse of dominance), but as an objective justification based the dominant undertaking being allowed to protect its interests.
[345] Monti (2007) 41. See also Townley (2009) 116-117, with the characteristic effects-based argument of deeming this as formalistic.
[346] In *IAZ* (fn. 26) 24 the Court found a restriction by object based on such intent, as discussed in Chapter I (on the concept of intent), even though the agreement also pursued public policy concerns and efficiency, namely 'the objective of protecting public health and reducing the cost of conformity checks'.
[347] Hursthouse (2013) Introduction.
[348] Hursthouse (2013) Section 2.
[349] Hursthouse (2013) Section 3, for example 'do what is honest/charitable; do not do what is dishonest/uncharitable'.
[350] Stucke (2006) 489.

ethics is exploitative abuses of dominance, insofar as 'exploitative' involves a judgment of the character of the dominant undertaking as expressed by its intent.

As also referred in Chapter V (on abuse of dominance), the case law on exploitative abuses does not reflect the economic notion of consumer harm, since a dominant position is defined by the possibility to charge such a supra-competitive margin and this would equal prohibiting dominance itself. Although a deontological rule could be formulated against prices above economic value, which the case law also mentions, this appears to only come into play after the price is considered disproportionate.[351] This shifts the judgment to the dominant undertaking's intent, namely whether it is justified in intending to charge such prices. There is an indication that prices above economic value are allowed according to circumstances.[352] Therefore, the case law on exploitative prices and contractual conditions is better explained as a principle prohibiting dominant undertakings from being greedy, unfair or unreasonable, expressions (vices) that incorporate a proportionality judgment.[353]

Once deontology and virtue ethics have proven useful in interpreting case law which cannot be explained by consequentialism, it is possible to start investigating if they provide a better explanation when consequentialism is also a possibility. The interpretation of market integration as deontological is particularly important for this, since it shows that the Court's teleological interpretation is not limited to consequentialism. Lianos has remarked that one of the reasons allowing the 'goal-oriented approach of legal interpretation to thrive' is the Court's teleological interpretation.[354] However, teleological interpretation can also be employed in relation to principles, namely working towards the generally applicability of a moral norm or the furthering of certain virtues. The Court's most iconic teleological interpretations have been on the Internal Market and, assuming that these methods have been transposed to EU competition law, the predominance of restrictions by object – and not restrictions by

[351] As referred in Chapter V (on abuse of dominance), excessive prices have been found when there is 'no reasonable relationship' or the prices are 'disproportionate' to economic value, not when such value is exceeded, see *United Brands* (fn. 16) 250 and Case C-385/07 P *Duales System Deutschland* [2009] ECR I-6155 141.
[352] See O'Donoghue and Padilla (2013) 238, for example the reward for successful intellectual property.
[353] Stucke (2012) 836 concludes that 'in behavioral labs, courtrooms, and the marketplace, people […] assess whether kindness or greed motivates the intentional corporate behavior'. In contrast, by applying an economic (outcome-driven) perspective, Motta (2007) 69 can only conclude that 'deciding if a price is too high or not involves a high degree arbitrariness'.
[354] Lianos (2013) 53, giving the example of *Continental Can* (fn. 145) 22.

effect – on issues of market integration signals that the Court prefers to employ teleological interpretation to principles and not policies.[355]

The inability of market integration and exploitation to be fully explained by consequentialist goals has not gone unnoticed in the doctrine, leading to their classification as exceptions to an 'effects-based approach'. First, a 'single market imperative' is either presented as exceptional due to the character of the EU project or subject to some conciliatory effort with a more clearly consequentialist goal.[356] Second, it is held that application of Article 102 should be centred on exclusionary abuses, not exploitative ones, in order to prevent the market power that allows exploitation.[357] A conception of EU competition law that frames judgements like *Consten and Grundig* and *United Brands* as exceptional is debatable. Nonetheless, it is true that the normative value of intent under a non-consequentialist approach can only be truly expressed if proven in relation to the core of EU competition law issues of harm to competitors and collusion. This will be addressed in the next section.

ii. The 'doctrine of double effect'

The main question of competition law can be said to be: what are undertakings able to do in their pursuit of market power.[358] Under Article 101, that question involves undertakings' ability to cooperate. Under Article 102, it mainly involves a dominant undertaking's ability to cause harm to competitors. It has been seen that behaviour can be judged based on either its intent or effects. In order to assess whether that distinction is useful in relation to harm to competitors, it is worth quoting the following parable by Dworkin on 'competition and injury':

> 'Here are two sad stories. (1) You are hiking in the Arizona desert with a stranger, you are both bitten by rattlesnakes, and you both see a vial of antidote lying in the scrabble. Both race for it, but you are nearer and grab it. He pleads for it, but you open and swallow it yourself. You live and he dies. (2) As before, but this time he is closer to the antidote, and he grabs it. You plead for it, but he refuses and is about

[355] This predominance is attributed by Lianos (2013) 63 to competition authorities preferring to undertake this type of analysis, but this is also a reflection of the case law.
[356] See Whish and Bailey (2012) 23-24 and Odudu (2006) 20-21, respectively.
[357] See Motta (2007) 69-70. This view can be said to have led the Commission to focus the 'modernisation' of Article 102 on exclusionary abuses, see Enforcement Guidance on Article 102 8.
[358] See Evans and Hylton (2008) 8, answering that in US antitrust '[t]he focus is on tactics rather than outcomes'. Nonetheless, they view the competitive process as geared towards 'long-run economy-wide consumer welfare', a rules consequentialist approach, see Evans and Hylton (2008) 21.

to open and swallow it. You have a gun; you shoot him dead and take the antidote yourself. You live and he dies'.[359]

Dworkin uses this parable to attack consequentialism: the outcome of both stories is ostensibly the same, so consequentialism treats them no differently.[360] Dworkin argues that there is a difference: taking the antidote for oneself is justified, but not killing the stranger. The difference is between killing and letting die.

Dworkin takes inspiration in Kantian philosophy to claim that one has a responsibility for one's own life, and must recognise a parallel responsibility in others.[361] The only way to reconcile these parallel responsibilities is to distinguish between 'competition harm' and 'deliberate harm'. In order to illustrate this, Dworkin provides another parable of swimmers competing in the game of life.[362] Competition harm cannot be prohibited, since one swimmer will get 'the blue ribbon or the job or the lover or the house on the hill that another wants'.[363] Each swimmer concentrates on his own lane aware that, if he or she wins, others must lose. Another thing is for a swimmer to cross the lanes to deliberately hurt another swimmer. Dworkin concludes that '[w]e need the right to compete to lead our own lives, but we do not need the right deliberately to injure others'.[364] On the contrary, responsibility for our own lives requires 'a moral immunity from deliberate harm by others'.[365] With these arguments, Dworkin sketches a convincing deontological defence for the case law on Article 102, examined in Chapter V (on abuse of dominance), that it is abusive for undertakings to intend to harm competitors.

In contrast, the intent to harm competitors should be irrelevant under a consequentialist view. For the goals of consumer welfare or efficiency, inefficient competitors should be excluded and efficient competitors thrive no matter if the harm is deliberate or from competition. Roughly speaking, the concern under these goals would be anti-competitive effects on consumers and as-efficient competitors. There might be more sympathy for inefficient competitors under the goal of protecting the competitive process, but competition and deliberate harm are not distinguished within such process.

[359] Dworkin (2011) 285.
[360] The isolated setting is used to prevent a rules consequentialism that would factor in the effect on the taboo against murder, see Dworkin (2011) 285-286.
[361] Dworkin (2011) 287. This does not nullify, and indeed follows, from the recognition of the dignity of the life of strangers, which one has the duty to aid in situations of great need.
[362] Dworkin (2011) 287-288.
[363] Dworkin (2011) 287.
[364] Dworkin (2011) 288.
[365] Dworkin (2011) 288.

The concern is whether rivalry is preserved and barriers stay low. In defence of consequentialism, it could be argued that Dworkin's parables do not get competition between undertakings right. Such competition does not take place in separate lanes – it is more akin to having a knife fight for the antidote. In US antitrust, Easterbrook has stated that:

> 'Wanting harm, even bankruptcy, to come to one's business rivals is not actionable; hatred is a spur to competition, which serves consumers' interests. Entrepreneurs are privileged to compete because any effort to separate pure from impure motives would in the end undercut the power of rivalry to promote consumers' welfare'.[366]

Stucke comments that, in stating so, Easterbrook assumes it is not possible to distinguish between good and bad intent.[367] This is an issue in US antitrust, as intent must be considered under a 'rule of reason'.[368] In EU competition law, however, it would be possible to bypass intent and focus on goals. A consequentialist could thus argue that Dworkin's examples are inadequate because the harm of one undertaking is not considered against the benefit of another. Such harm, regardless of being deliberate or from competition, would result in an improvement to consumer welfare, efficiency or the competitive process.

In order to explain how intent matters in situations where harm is used to achieve a good, such as harm to competitors benefiting consumer welfare or efficiency, it is useful to take a much debated case in moral philosophy dubbed the 'trolley problem'.[369] The 'trolley problem' starts by a first situation where the mentioned trolley loses its breaks and careers uncontrollably towards five people further down the track. One onlooker stands close to a switch which can send the trolley to a side track. However, on that side track is another person. None of these people have any chance of escaping death if hit by the trolley. The question is whether the onlooker should switch the trolley to the side track.

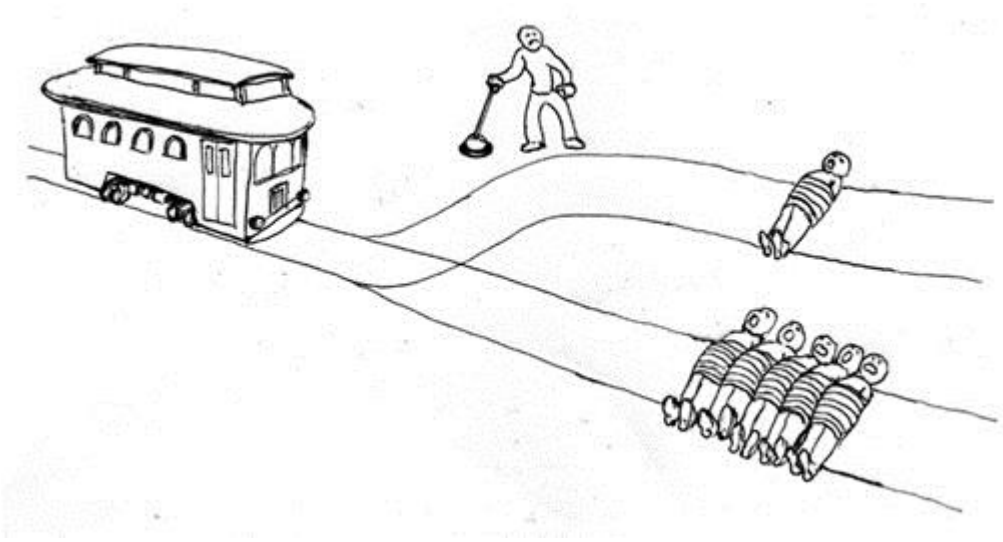
---

[366] Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1255 (7th Cir. 1995), cited by Stucke (2012) 820.

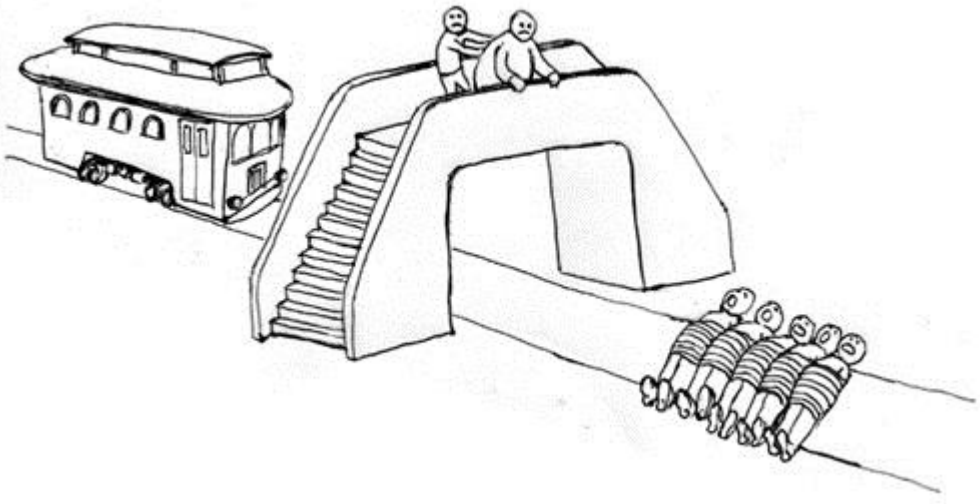
[367] Stucke (2012) 820, attributing the same assumption to Posner for having commented that ''[m]ost businessmen don't like their competitors, or for that matter competition' in Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 379-80 (7th Cir. 1986).

[368] See Stucke (2012) 815.

[369] See Hauser (2006) 123-128 and Mikhail (2011) 78-81. Since the essence of the problem is to elicit intuitive reactions, it will be illustrated with pictures as it is often done (taken from http://advocatusatheist.blogspot.co.uk/2011/10/trolley-problem-thought.html). Although the problem specifies people are either unaware of the trolley or unable to leave the track, they are pictured as tied to the track for the sake of simplicity.



The answer given by moral philosophers is then compared to a second situation. As in the first, a runaway trolley heads towards five people. However, instead of a side track, there is a bridge overlooking the trolley. On that bridge stands an onlooker and a fat person with just the right volume to stop the trolley, but who would not survive the impact. The question is whether the onlooker should push the fat person on to the track.



Although these situations are clearly manufactured, they have the advantage of eliciting intuitive reactions which have been able to be empirically tested on a large number of people.[370] From a consequentialist point of view, there is again no difference between these situations: five lives can be saved at the price of one. However, most people have answered that it is permissible for the onlooker to switch the track but not to push the fat person. Mikhail observes that these judgments are 'principled': they are stable, stringent

[370] See Hauser (2006) 133-143. The first situation is also compared to the less artificial scenario of a doctor killing a healthy person to obtain organs to save five people. There are many variants of the 'trolley problem', including a fat person on the side track and an obstacle on the side track with a regular person standing in front of it.

and highly predictable.[371] However, when asked to justify these judgements, most people are unable to provide a coherent reasoning.[372] The prevalent explanation is that, in the first situation, by switching the track the onlooker intends to save five people but not kill the one. That death is an unintended consequence. In contrast, in the second situation, the onlooker intends to kill the fat person as a means to save the five people. The reasoning of the 'trolley problem' can be transposed to EU competition law. If one considers saving the five people as any good goal (consumer welfare, efficiency or the competitive process), it is possible to see how the intent to harm (an undertaking) can be relevant even if that harm is necessary to achieve such goal.

Both Dworkin's parables and the 'trolley problem' fall under the 'doctrine of double effect'. This doctrine states that sometimes it is permissible to cause harm as a side effect (or 'double effect') of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end.[373] In the first situation provided the harm is merely foreseen (the stranger dying because there is not enough antidote, swimmers not getting a reward because another won, the person being hit by trolley because the track was changed), while in the second it is intentional (the stranger being shot, the swimmer being assaulted in his lane, the fat person being pushed). Although the examples given so far are constructed, the 'doctrine of double effect' has always been considered of significant practical importance, from collateral damage in war to medical proceedings with potentially dangerous consequences.[374] Its philosophical tradition goes back to Aquinas, but fell into some disuse as the notion of intention as a 'state of mind', discussed in Chapter I (on the concept of intent), took hold: in order not to be considered morally responsible, one would only have to 'direct' his or her mind away from the consequences.[375] It was against this development that Anscombe formulated the objective notion of intention, also discussed in Chapter I (on the concept of intent), as answering the question 'why?' by giving reasons.

As can be seen from all the above examples, the 'doctrine of double effect' is directly opposed to consequentialism. It was Anscombe that coined the expression 'consequentialism', based precisely on the lack of distinction between foreseen and intended consequences.[376] Competition law can easily fall into this approach in relation

[371] See Mikhail (2011) 83.
[372] See Mikhail (2011) 83-84
[373] See McIntyre (2011) Introduction and Edmonds (2014) 30.
[374] See McIntyre (2011) Section 2.
[375] See Teichmann (2008) 117-118.
[376] See Teichmann (2008) 86.

to harm to competitors since, as Easterbrook comments, '[y]ou cannot be a sensible business executive without understanding the link among prices, your firm's success, and other firms' distress'.[377] This link can be understood as knowing that competitors will be harmed by normal competition, and therefore normal competition being the same thing as intending such harm. It is also at the basis of the error, noted in Chapter I (on the concept of intent), of understanding all strategies that lead to a certain foreseen effect as being equal. The 'doctrine of double effect' does not disprove consequentialism: it may be that competition is better if undertakings are allowed to deliberately harm competitors, or that EU competition law should only consider effects in relation to its goals.[378] This question is dealt with below. For the moment, the purpose of the 'doctrine of double effect' is only to recognise that explains part of the case law on harm to competitors under Article 102 which consequentialism does not.

The doctrine of double effect thus provides an answer to two of the central problems of EU competition law: when undertakings are allowed to harm competitors, and when are they allowed to cooperate. Thus, as developed in Chapter V (on abuse of dominance), judging the intent to harm competitors as abusive under Article 102 is grounded on a sound distinction between such intent and knowing competitors will be harmed through normal competition – either by considering undertakings in relation to each other, as Dworkin does, or in relation to the goals of EU competition law. The 'doctrine of double effect' is also applied to collusion, the other main issue of EU competition law. As described in Chapter III (on collusion), undertakings influence each other equally through market action, particularly in oligopolistic markets, and agreements. A consequentialist approach acknowledges no difference, and views any as the result of formalism.[379] The solution under an 'effects-based approach', as already remarked, is to distinguish collusion and other 'jurisdictional' questions from the 'substantive' harm. It will be argued in Chapter III (on collusion) that such collusion already involves a pre-

[377] A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401-02 (7th Cir. 1989), quoted by Stucke (2012) 818.

[378] For example, criminal law often does not follow the 'doctrine of double effect'. As stated by Ashworth (2009) 172, foresight is considered as intention in some situations. This is due to the adoption of the notion of intention as a 'state of mind', which as remarked would allow to easily escaping responsibility without such correction. However, in doing so criminal law adopts a notion of intention which, as Ashworth notes, does not correspond to the everyday meaning, namely by differentiating different types of foresight (in order not to make intention too broad). It is interesting to note that Ashworth quotes Bentham (a consequentialist) in admitting 'oblique intent'. As discussed in Chapter I (on concept of intent), EU competition law adopts an objective and everyday ('folk psychology) notion of intention which evades this problem, allowing the use of the 'double effect doctrine'.

[379] For example, Motta (2007) 189 considers that the reason for distinguishing explicit and implicit (oligopolistic) collusion is the (current) unavailability of econometric techniques to separate collusion from regular competition.

substantive analysis. In agreements the substantive harm is intended, whereas in parallel behaviour it is a foreseen side-effect of each undertaking acting independently. Therefore, the 'doctrine of double effect' is essential in establishing an intent contrary to the principles of EU competition law, namely collusion and competition which is not 'on the merits', which as described below is the starting base for infringements of Articles 101 and 102.

iii. Reflective equilibrium

The issue of moral intuitions, which among others support the 'doctrine of double effect', is particularly relevant for judicial assessment which the present research focuses on. As both a judge and a legal pragmatic (and therefore close to consequentialism), Posner admits to and argues for judicial use of intuitions.[380] Moral intuitions are implicit in virtue ethics, but have received the most systematic treatment by Rawls as a 'sense of justice'. Rawls' theory of justice is better known for the arguments of the 'original position' and 'justice as fairness', but it also argues that a conception of justice must be 'stable'.[381] Stability means that norms are wilfully respected and there is a sanctioning system, but also requires a 'sense of justice'.[382] This 'sense of justice' can be defined as a normally developed moral capacity to judge matters just and unjust, as well as a desire to act in accordance to those judgments and an expectation others will do the same.[383] Like Dworkin, Rawls distinguishes the 'sense of justice' from the desire for outcomes described by natural or social sciences.[384] The 'sense of justice' depends on normative principles, which are of higher order and regulate the pursuit of those desires.[385] As Rawls describes:

> 'what is required is a formulation of a set of principles which, when conjoined to our beliefs and knowledge of the circumstances, would lead us to make these judgments with their supporting reasons were we to apply these principles conscientiously and intelligently. A conception of justice characterizes our moral sensibility when the everyday judgements we do make are in accordance with its

[380] See Posner (2010) 107-117.
[381] See Lianos (2013) 21-22 and Freeman (2007) 183-184.
[382] See Freeman (2007) 248. Rawls (1999) 435 states: 'To insure stability men must have a sense of justice or a concern for those who would be disadvantaged by their defection, preferably both. When these sentiments are sufficiently strong to overrule the temptations to violate the rules, just schemes are stable'.
[383] See Freeman (2007) 249 and Rawls (1999) 41.
[384] See Freeman (2007) 249-250.
[385] See Freeman (2007) 250.

> principles. These principles can serve as part of the premises of an argument which arrives at the matching judgments. We do not understand our sense of justice until we know in some systematic way covering a wide range of cases what these principles are'.[386]

The present research attempts to determine the normative principles that apply when EU competition law makes a judgment of behaviour based on intent. As set out in the introduction to this research, it is not necessary to discuss how far the Court's judicial decision making represents such intuitions. What matters is whether the interpretation of the case law, making it the 'best it can be' under Dworkin's conception described in Chapter I (on the concept of intent), involves moral judgments of intent. Rawls provides a framework on how to incorporate intuitions into moral judgments through the notion of 'reflective equilibrium'.[387] Under this notion, a 'sense of justice' confronts moral intuitions with moral conceptions such as the ones provided by the different theories of normative ethics. An equilibrium is reached 'after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception)'.[388]

The notion of 'reflective equilibrium' has been opposed under a consequentialist approach. Singer, a utilitarian, has argued that if moral intuitions do not fit moral theory, they should be discarded instead of attempting to change the theory.[389] For example, the 'trolley problem' might reflect the fact that evolution has made us averse to forms of killing that involve personal contact, explaining the difference between switching the track and pushing the fat person.[390] Therefore, for Singer, saving five lives at the cost of one is justified in both switching the track and pushing the fat person. Singer is aware that this also represents an intuition about the greater good, indeed the one at the essence of the utilitarianism that he defends – the same which leads people to consider permissible changing the track.[391] Singer therefore distinguishes between 'reasoned conclusions' and those that result from our evolutionary and cultural

[386] Rawls (1999) 41.
[387] See Freeman (2007) 30-31 and Rawls (1999) 42-43.
[388] Rawls (1999) 43. Singer (2005) 344-345 describes 'reflective equilibrium' with an analogy of testing scientific theories: 'In science, we generally accept the theory that best fits the data, but sometimes, if the theory is inherently plausible, we may be prepared to accept it even if it does not fit all the data. We might assume that the outlying data are erroneous, or that there are still undiscovered factors at work in that particular situation. In the case of a normative theory of ethics, Rawls assumes, the raw data is our prior moral judgments. We try to match them with a plausible theory, but if we cannot, we reject some of the judgments, and modify the theory so that it matches others. Eventually the plausibility of the theory and of the surviving judgments reach an equilibrium, and we then have the best possible theory'.
[389] See Singer (2005) 345.
[390] See Singer (2005) 347-348.
[391] See Singer (2005) 349.

history.[392] This represents a 'constructivist' approach akin, to Kant's formulation of moral norms by reason alone, which Rawls and Anscombe have argued against in favour of a 'realist' moral philosophy.[393]

Without entering into a controversy in the domain of meta-ethics, it is submitted that Rawls' 'sense of justice' can be used for interpreting the judicial assessment object of the present research. It was already seen that the case law represents moral intuitions, such as the 'doctrine of double effect', and that principles involve considering moral convictions. Several reasons recommend attempting to achieve a 'reflective equilibrium' between the two. First, this equilibrium does not exclude consequentialist moral convictions, like the ones expressed in EU competition law goals.[394] Therefore, if these give reason to revise the intuitions such as the 'doctrine of double effect', this can be done. Second, the stability which Rawls attempts to achieve through a 'sense of justice' is also important for the Court's case law. If the case law goes against moral intuitions that cannot be revised, it is likely to lead to errors even if a rational approach is genuinely attempted: of the Court in its application, and of interpreters in their understanding. Finally, Singer's approach requires a distinction between the rational and the cultural or evolutionary. The example of the 'trolley problem' shows how difficult this is. On the one hand, there are several rationalisations of its results, such as Dworkin's above. On the other, Singer's evolutionary explanation hardly applies to the fact that undertakings are, like the fat person, protected from deliberate harm. Rather than centring the discussion to the cause of this intuition, it is better to confront it with moral convictions and see if equilibrium is possible.

iv. The normative value of intent

The notions of moral judgment and 'reflective equilibrium' examined above are the foundation for the normative value of intent in EU competition law. This value must be distinguished from the consensual value also attributed to effects. The doctrinal attention given to the goals of EU competition law is the natural recognition that certain outcomes are normatively desirable. Insofar as intent is used in subordination to effects, namely to interpret or predict them, it shares this normative value. This subordinate role

[392] See Singer (2005) 350.
[393] See Freeman (2007) 291-294 and Teichmann (2008) 103.
[394] See Freeman (2007) 37.

was admitted above but also excluded from the present research. Only an autonomous normative value is relevant for the present purposes. Without it, the examples given above of intent's role in analysing restrictions to parallel imports, exploitative abuses, harm to competitors or collusion risk being classified as normatively incoherent and a target for legal reform – as developed in the respective chapters below, this is how they are treated by many authors. That is somewhat logical, since those examples cannot be understood under the consequentialist approach that the goals of EU competition law embody. An autonomous normative value depends on considering those examples as applying principles based on a moral judgment of intent.

It should first be stated how the different normative values of intent and effects make this debate particularly difficult. For example, it could be held, against the mainstream view that 'competition, not competitors' should be protected, that it is logical to protect competitors from deliberate harm because even inefficient competitors may contribute to consumer welfare, or that new entrants might require a lead to catch up on the incumbent's efficiency, or that this will result in less concentrated markets or socially desirable small undertakings.[395] Those arguments, no matter how true, will nevertheless play to a corresponding goal. Depending on different results according to each goal (including errors of over- and under-inclusion if rules are employed), those arguments would culminate in a balancing exercise. Despite such arguments not being associated with an 'effects-based approach', that is what they represent. Another thing is to argue that competitors are protected from deliberate harm because that corresponds to a deontological rule or to virtuous competition. Philosophers have been debating similar moral alternatives for centuries. Indeed, many authors appear to be attracted to competition law because the use of economics implies an acceptance of consequentialism. The present research, on the contrary, makes no claim whatsoever that any moral view is preferable.

What the present research argues is that, contrary to an 'effects-based approach', behaviour should be judged solely on one substantive criterion. It is clear that behaviour is judged on effects in the several situations described above. Indeed, the onus is on an 'effects-based approach' to explain every standard and every rule as capturing effects. As will be developed in the chapters below, it fails to do so. A broader normative outlook is also hinted by the fact that EU law, particularly the provisions on free movement, also consider purpose – though not strictly intent, as stated in Chapter I (on

[395] See Mestmäcker (2011) 50-51 and Monti (2007) 166.

the concept of intent) – in alternative to effects. It is hard to ignore the influence of those judicial methods in EU competition law.[396] Finally, judging intent establishes a normative connection with the intended effects. It is perfectly compatible with finding those effects as normatively undesirable. An 'effects-based approach', on the other hand, attempts to cut the connection with intent. It considers that an undertaking's intent should be normatively irrelevant beyond its causal function. This goes against the moral intuition, formalised in many fields of law, that some intent is indeed censorable.

It is further argued that the normative value of intent represents a 'reflective equilibrium' in EU competition law, and the stability which it provides is the reason why such value must be recognised. In contrast, an 'effects-based approach' which denies normative value to intent is neither implemented nor can it reach such equilibrium without fundamentally changing the nature of EU competition law. This is not because the moral intuition of distinguishing between intended and foreseen effects cannot be revised by consequentialist reasons. The history of competition law includes revisions of moral intuitions, such as considering cartels illegal instead of gentlemanly agreements or the discrediting of the idea of 'cut-throat competition'.[397] Moral intuitions are shaped by culture, as Singer points out, and as economic notions become generally accepted they are integrated into such intuitions. For example, in the present day efficiency might be counted as virtue.[398] What safeguards the normative value of intent is that there is no need for such revision, insofar as the use of intent is admitted as part of 'paradigms' shared by all moral convictions.

'Paradigms' are interpretative devices which allow circumventing disagreements about moral concepts. Dworkin describes how we agree that certain concepts are moral, but disagree about their precise character and the correct reaction.[399] This does not prevent that 'we agree sufficiently about what we take to be paradigm instances of the concept, and paradigm cases of appropriate reactions about those instances'.[400] As seen so far, there is disagreement on how to judge behaviour as anti-competitive, both within the consequentialist goals of EU competition law, and in relation to other normative ethics. There is some agreement, however, on what behaviour is not anti-competitive: the one that corresponds to perfectly competitive markets. In their ideal form, perfectly

[396] The dichotomy between intent and effects is not exclusive to EU competition provisions. The 'purpose or effect of violating the dignity of a person' is stated in several definitions of harassment in EU labour legislation, see Driessen-Reilly (2003) 496.
[397] Whish and Bailey (2012) 13-14.
[398] Monti (2007) 46 considers efficiency a 'core value', showing it can go beyond measuring effects.
[399] See Dworkin (2011) 160.
[400] Dworkin (2011) 160-161.

competitive markets lead to consumer welfare and efficiency, follow moral norms that are generally accepted, and are constituted by virtuous participants. From perfectly competitive markets, the case law has extracted two paradigms: independence of economic action and competition on the merits. These have been established as principles of EU competition law which, as described throughout the present research, influence all the conditions of Articles 101 and 102.

The principle of independence of economic action roughly consists in what the Court stated in *T-Mobile* as 'the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt'.[401] This corresponds to the paradigm of undertakings determining their behaviour relying solely on the conditions set by the market. In doing so, as discussed in Chapter III (on collusion), it excludes from the scope of Article 101 the situations where an undertaking reacts to freely available market information. All moral conceptions support this principle. For deontology, it is a norm which allows undertakings to act freely. For virtue ethics, undertakings do not take any unfair advantage. For consequentialism, acting on market information causes the best outcomes.[402] As Lianos describes:

> 'If competition law perceives collusion with more suspicion than unilateral conduct, it is because competition law is based on the assumption that the free market system where firms will be price takers and will independently decide their commercial strategy according to their own costs and to their own estimates of consumer preferences, constitutes the default organizational structure in modern economy. This is in conformity with the assumptions of the perfect competition model, which still constitutes the intellectual backbone of competition law'.[403]

The principle of independence of economic action sets the scope of normative relevance under Article 101, as also described in Chapter III (on collusion), allowing adjudication in the grey area where undertakings make indirect contact through the market. Once the principle is breached, the normative consensus ends. Therefore, after collusion has been found, an infringement of Article 101 requires a restriction by object or effect. Chapter IV (on restrictions of competition) will discuss how restrictions by object are judgments of intent under deontology or virtue ethics (such as the already mentioned restrictions of parallel trade or the restrictions allowed to certain types of undertakings), while restrictions by effects represent the consequentialist goals of EU competition law.

---

[401] *T-Mobile* (fn. 73) 32.
[402] The issue of outcomes in oligopolistic markets is addressed below.
[403] Lianos (2013) 1076.

The same happens in relation to the principle of competition on the merits. As described in Chapter V (on abuse of dominance), the Court stated in *Post Danmark* that competition on the merits may 'lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation'.[404] This corresponds to the paradigm of market success being determined by (unconstrained) consumer choice. Such paradigm allows dominant undertakings to harm competitors indirectly. Again, all moral conceptions support this principle. Deontology does not recognise a right to participate in the market protected from this harm, as noted above. Consumer choice will reflect the undertakings' virtues. Consequentialism also accepts consumer choice as the key to the competitive process, improving consumer welfare and efficiency.[405] The principle of competition on the merits signals the behaviour which is normatively relevant under Article 102. Gerber states that it 'is not a "test" for actually determining that conduct distorts competition; it is rather an indication of potential distortion'.[406] Once there is such indication, tests of abuse apply that can be based on either intent or effects, reflecting the different normative ethics employed. Hence, as detailed in Chapter V (on abuse of dominance), after competition on the merits has been dismissed an infringement of Article 102 further requires specific abuses, which can represent the intent to harm competitors or the effects of indirect harm.

Despite branching off into intent or effects once they are breached, both the principle of independent economic action and competition on the merits are based on intent. This is because they do not correspond to sufficiently precise effects. It is recognised that the effects of independent economic action can be the same as those of collusion in terms of manifesting market power.[407] Thus, the solution is to examine whether the undertakings' intent is a decision to act on market-provided beliefs. Competition on the merits would seem to correspond to certain effects, such as the availability of efficient choices and the marginalisation of inefficient ones. However, this discounts the role of luck and irrationality, something which the US Supreme Court admitted by stating that market success can come as 'a consequence of superior product, business acumen, or

[404] *Post Danmark* (fn. 138) 22.
[405] As Eilmansberger (2005) 149 comments, this effect 'is in itself not abusive, but must be accepted if it is the consequence of normal competition', referring to the formulation that the case law has used, 'normal competition in products or services on the basis of the transactions of commercial operators'.
[406] Gerber (2007) 43, arguing nonetheless for a wide consumer welfare goal.
[407] See Motta (2007) 189, as referred above.

historic accident'.[408] Moreover, competition on the merits is limited to indirect harm, caused by the choices of consumers. It does not cover direct harm, caused by the interaction between the dominant undertaking and its competitors. Hence, the harm to inefficient competitors is the same in permissible competition on the merits and potentially abusive direct harm. The solution is again to focus on the intent of the dominant undertaking, as discussed in Chapter V (on abuse of dominance), namely whether it uses 'methods different from normal competition'.

The autonomous normative value of intent is guaranteed by its integration in such principles, and by the fact that they are in 'reflective equilibrium'. The intent-based tests that apply after those principles are breached are also the object of the present research, since they have their own normative value, but they can always be revised by the Court into effects-based tests (and vice-versa). The same cannot be said of these principles, since the alternatives have already been contemplated and rejected. Parallel behaviour might lead to undesirable outcomes in oligopolistic markets, so that an 'effects-based approach' would justify finding collusion under Article 101. As discussed in Chapter III (on collusion), this has not happened because parallel behaviour cannot be distinguished from the paradigm of independent economic behaviour. Similarly, a full 'effects-based approach' would consider any action that leads to an undesirable effect, namely an increase in market power, as potentially abusive under Article 102. As observed in Chapter V (on abuse of dominance), the Court did so in *Continental Can*, but has since retreated by only considering abusive 'methods different from normal competition'. In essence, the Court has rejected using effects to determine normative relevance under Articles 101 and 102, limiting them to tests to be applied after. The use of intent with normative relevance has proven stable because the intuitions of the 'double effect doctrine' are in 'reflective equilibrium' with the paradigms that the principles of independence of economic action and competition on the merits represent.

4. Conclusion

This chapter discussed how behaviour can be judged based on intent. Although this was presented as an alternative to a judgment based on anti-competitive effects, it was

[408] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). Luck is also admitted by Dworkin (2011) 298-299 as a morally valid source of competition harm.

necessary to address the claim by advocates an 'effects-based approach' that EU competition law should only employ the latter (with intent merely serving as a proxy for effects). An 'effects-based approach' draws from the normative value of the goals of EU competition law: insofar as these goals are related to outcomes, it makes sense to use effects as a substantive criterion. This approach provides a method to deal with the plurality of goals, by using the selection of relevant effects to balance or prioritise them, and a program to change EU competition law as these goals evolve, by preferring a standard of effects which is not pinned down to previous balancing formalised into rules. It also provides a way to dismiss the use of other substantive criteria, either as formalistic errors caused by the application of rules or as 'jurisdictional' elements to be separated from 'substantive' ones. Although internally coherent, an 'effects-based approach' must be measured by its success in explaining the case law.

Some instances of the case law cannot be explained under the consequentialist view embodied in the goals of EU competition law. The values of the EU open the door to alternative normative views, namely deontology and virtue ethics. In particular, the consequentialist assimilation between intended are foreseen effects runs counter to the notions of intentional collusion and harm to competitors under the 'double effect doctrine'. The normative value of intent corresponds to a 'sense of justice', as defined by Rawls, insofar as it provides a 'reflective equilibrium' between the moral intuitions of the 'double effect doctrine' and the different moral convictions, including consequentialism. Some normative consensus is possible in relation to the paradigms of independence of economic action and competition on the merits. Those paradigms are based on intent and are stable principles. An 'effects-based approach' would not be able to achieve the same equilibrium, since it would both go against these intuitions and have to depart from these paradigms.

Although sporting analogies are overused in competition law, the following description (to be taken loosely) might make this framework easier to understand. Sporting rules are usually meant to achieve certain objectives (consequentialism), notably the benefit of the audience (consumer welfare) and the improvement of the players (efficiency), taking into consideration the beneficial impact on society (public policy). This can be done indirectly, by concentrating on having the best match possible (competitive process). Such objectives lead to a set of rules which are easy to administrate by examining what is before the referee: the playing field, team composition, live play, scoring, etc. (outcomes). It can also sometimes lead to disagreements: for example, how long should

the referee interrupt play for assisting injured players, knowing it is detrimental to the audience but might be beneficial for the player and the match. The solution is to consider the consequences for the different objectives (‘effects-based approach’).

Other sporting rules, however, do not appear to be fully explained by these objectives. Players are banned from acts of aggression (deontology) and are expected to act with ‘fair play’ (virtue ethics), regardless of how entertaining this is or how much it would improve matches. It is however generally accepted (paradigm) that players cannot be distracted by adversaries (independence) or impeded from playing (harm). Because distraction and harm are part of normal play, the referee has to decide if words said or player contact was intentional (‘double effect doctrine’). After deciding if there is a foul, the referee has to further the context to give disciplinary action or to wave play on (intent and effects tests). The referee has to rely on his intuition and knowledge of the rules (‘sense of justice’). As many games are played, it becomes apparent whether referees are easily fooled or not, or whether other criteria are needed to deal with ambiguous or new situations (reflective equilibrium). Disciplinary action may become mandatory, regardless of intention, when there are serious consequences for the match or player health (‘effects-based approach’ again). The fact, however, is that awarding the basic foul continues to be done based on intention (stability).

CHAPTER III

Collusion

Chapters I (on the concept of intent) and Chapter II (on judging intent) established the framework of the present research. From the present chapter onwards, this framework will be applied to the three main substantive conditions of Articles 101 and 102. This chapter will discuss the first of these conditions, the notion of collusion as embodied in the different forms referred to in Article 101: agreements, decisions by associations of undertakings and concerted practices. Collusion is expressly based on intent, as the case law has referred to intention in defining both agreements and concerted practices. The Court has stated that an agreement:

> 'centres on the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention'.[409]

The Court has also emphasised knowledge – which, as seen in Chapter I (on the concept of intent), is part of the characterisation of intent – in the definition of concerted practices as:

> 'a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.[410]

The issue therefore is not the use of intent, but whether it has substantive value under the principles of EU competition law or it is merely 'jurisdictional' and lacking substantive value. As mentioned in Chapter II (on judging intent), framing collusion as 'jurisdictional' is particularly important for an 'effects-based approach', since it is the only explanation for parallel behaviour having the same legal consequences as cartels when it may have the exact same effects. Hence, the doctrine has conceptualised agreements under an offer-acceptance model inspired in contract law but without any substantive competitive concerns, with concerted practices serving to overcome an evidentiary burden by focusing on contact.[411] Authors have discussed further

[409] *Bayer* (fn. 118) 69.
[410] Cases 48-49 and 51-57/69 *ICI* [1972] ECR 619 64.
[411] See Odudu (2006) 59-60 and 75-77.

refinements of these concepts.[412] There is nevertheless a limit to such refinement, as the Court has established that a precise characterisation as a particular form of collusion is unnecessary.[413] As such, there has been an effort to develop a unitary 'jurisdictional' explanation for all the forms of collusion. Arguing that defining concerted practices as common intent overlaps with agreements, Odudu holds that collusion can be defined as a reduction of uncertainty.[414] Such reduction of uncertainty would be achieved by common intention in an agreement or by a communication in a concerted practice. As developed below, this would significantly broaden the scope of EU competition law. Odudu freely admits to this, arguing that collusion must lose its pejorative sense.[415] This sense only leads to collusion and restriction of competition becoming confused, when the 'jurisdictional and substantive questions are, and ought to remain, separate'.[416]

This chapter will argue to the contrary that collusion is indeed linked to judging competitive as anti-competitive. This can be called a pre-substantive analysis of intent, insofar as intent is attributed normative value for deciding whether behaviour is anti-competitive in advance to the substantive condition analysed in Chapter IV (on restrictions of competition). This implies that certain normative choices are made within the notion of collusion, going against its supposedly neutral 'jurisdictional' character. In this vein, Lianos criticises 'the mirage of "the jurisdictional function"', arguing that 'it is generally substantive policy concerns that have framed the concept of agreement'.[417] The confirmation that substantive criteria are at play comes from the fact that (as Odudu also notes to have happened) collusion has been rejected by applying the same language used to judge the existence of a restriction.[418] The Court stated in *Suiker* that:

> 'The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt'.[419]

This statement is applicable both to the concerted practices found in *Suiker* and to judging them as anti-competitive. As such, after finding an agreement in *BIDS*, the

[412] See Black (2008) 118-120.
[413] See Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125 32.
[414] See Odudu (2006) 81-82.
[415] See Odudu (2006) 87.
[416] Odudu (2006) 91.
[417] Lianos (2008) 1035. As discussed below, Lianos argues for pre-substantive analysis based on an 'effects-based approach', which involves rejecting the current intent-based case law.
[418] See Odudu (2006) 88.
[419] Cases 40-48, 50, 54-56, 111 and 113-114/73 *Suiker* [1975] ECR 1663 173.

Court considered it restrictive by object repeating the same language.[420] The reference to 'each economic operator [determining] independently the policy which he intends to adopt' is the foundation of the principle of independence of economic action, as already mentioned in Chapter II (on judging intent).

This chapter will describe how the intent behind the concepts of agreement and concerted practice is judged in light of the principle of independence of economic action. Namely, the 'doctrine of double effect' allows distinguishing between actions intended to influence the independence of undertakings and those that merely have that foreseen side-effect. After collusion has been found the substantive value of the intent to influence might vary. As will be discussed in Chapter IV (on restrictions of competition), this value can range from the irrelevance in restrictions by effect to the pre-substantive analysis of intent being transposed directly into the restriction by object based on the same principle of independence of economic action. As such, if an undertaking is found to have influenced the independence of competitors in setting the parameters of competition (price, output, distribution, etc.) it is very likely to also be considered a restriction by object. A restriction by object will however be shown to ultimately depend on context, and the same reasoning applies to collusion. Thus, after finding intent which is contrary to the principle of independence of economic action, in the form of direct or indirect influence of an undertaking behaviour, it will be seen how certain types of influence are considered normatively accepted. This normative judgment is, under the view argued in this chapter, the main distinction between collusion and instances of acceptable intended influence such as contacts within a distribution network or publicly released information.

This chapter will therefore describe how the doctrinally accepted view of collusion as a 'jurisdictional' condition, namely the assimilation of agreements to contractual offer-acceptance and concerted practices to contact, fails to provide a coherent explanation of the case law. Even if some judgments can be read in that light in order to further an 'effects-based approach', only the principle of independence of economic action can satisfactorily explains agreements which do not correspond to offer-acceptance and instances of contact which do lead to concerted practices. The chapter will start by discussing a unitary notion of collusion, confronting a 'jurisdictional' reduction of uncertainty with substantive conceptions of independence of economic action (**1.**). It will then examine the specific forms of collusion, namely the characterisation of

[420] See *BIDS* (fn. 25) 34.

agreements as 'offer-acceptance' and concerted practices as contact or as varieties of common intent to produce a collusive outcome (**2.**). The chapter will not specifically cover decisions by associations of undertakings, since they involve the intent of agreements and concerted practices, namely influencing independence through beliefs and desires, in relation to the association itself and its member undertakings.[421]

1. A unitary notion of collusion

This section will discuss a unitary notion of collusion applying to all forms of collusion referred to in Article 101. The doctrine has focused on these forms, as already stated, since the leading judgments on collusion have hinged the existence of an infringement on their boundaries. Notably, the notion of agreement discussed below has been used to differentiate collusion from unilateral action. As also discussed, the borders between each form have been given less importance, with the Court accepting that the Commission characterises an infringement as an 'agreement or concerted practice'.[422] This means that, no matter how specific their definition, the notions of agreement, concerted practice and decisions by associations of undertakings must retain a common root. This section will compare the two main alternatives for a unitary notion of collusion: a neutral 'jurisdictional' concept, according to Odudu's notion of reduction of uncertainty (i), and a 'pre-substantive' analysis, based either on the 'effects-based approach' argued by Lianos or on the principle of independence of economic action argued by the present research (ii).

i. Neutral 'jurisdictional' concept

The reduction of uncertainty can serve as a neutral 'jurisdictional' concept insofar as it delegates to the notion of restriction of competition whether the reduction leads to any anti-competitive effect. In order to arrive at this notion, Odudu asks 'why undertakings

[421] Decisions by associations of undertakings provide a way to deal with collective activity without having to aggregate individual instances of collusion. They can additionally be said to clarify that facilitating collusion is against independence of economic action (which also applies to undertakings, see Case T-99/04 *AC-Treuhand* [2008] ECR II-1501 136). Otherwise, the issues of the association's economic activity or the 'sanctioning question' are not covered by the present research.
[422] See Case C-49/92 P *Anic* [1999] ECR I-4125 112, 132-133.

enter into agreements or engage in concerted practices'.[423] The answer given is that 'legally enforceable agreements reduce uncertainty', while concerted practices are 'conduct which reduces uncertainty'.[424] This approach would rely on the case law references to collusion as 'substitut[ing] practical cooperation between undertakings for the risks of competition'.[425] According to Odudu, the risks of competition 'are that an undertaking does not know how competitors, trading partners, and customers will act in the future', and is that uncertainty which provides competitive impetus.[426] As already discussed, this approach deflects any arguments that harmless behaviour is 'jurisdictionally' caught by leaving that to the 'substantive' question. A 'jurisdictional' concept would also explain the distinction with parallel behaviour in oligopoly: an outcome 'as if' there was collusion is not prohibited without evidence of an agreement or communication of information under a concerted practice.[427]

The notion of collusion as a reduction of uncertainty does not however correspond to the theoretical and practical framework of competition. The greatest 'risk of competition' for undertakings is their exclusion by more efficient competitors, a fact which is usually unclouded by any uncertainty. A perfectly competitive market is characterised by perfect information, each participant knowing at any moment what competitors and consumers will do.[428] Real markets are not as transparent, but, as referred in Chapter I (on the concept of intent), it is normal to assume that undertakings are aware of competing offers and consumer preferences. What holds true in both perfect and real markets is that, with no market power, undertakings have no possibility to escape competitive market forces of which they are only too well aware. As Motta states for horizontal relationships, '[c]ollusive practices allow firms to exert market power they would not otherwise have'.[429] When undertakings gain market power, they produce uncertainty: no longer bound by the market, their range of actions expands. This is well understood in the economic study of oligopolies – where, as Jones and Sufrin quote from economists, 'virtually anything can happen'.[430]

This makes the reduction of uncertainty a poor fit for a unitary notion of collusion, since it is not represented in many agreements and concerted practices. Monti observes that 'it

[423] Odudu (2006) 82.
[424] Odudu (2006) 82-83.
[425] *ICI* (fn. 493) 64 and *BIDS* (fn. 25) 34.
[426] Odudu (2006) 83.
[427] See Odudu (2006) 91.
[428] See Whish and Bailey (2012) 7. Since there are no barriers to entry or exit, technological advances by competitors are irrelevant.
[429] Motta (2007) 137.
[430] Jones and Sufrin (2014) 660.

is only in oligopoly markets that a concerted practice can serve to reduce uncertainty'.[431] As such, it is exchanges of information in oligopolies that Odudu has in mind, where the increase in transparency does reduce the uncertainty created by market power – exactly because market forces then step in to rule out certain behaviour as irrational.[432] This corresponds to the notion of concerted practice as disclosure of information discussed below. However, Odudu goes further by considering this analogous to the gains of certainty originated by a contract, under an interpretation of agreements under contractual law, also discussed below. It is submitted that these conceptions of economic and contractual certainty do not match. An agreement with exclusionary effects might set out the parties' actions, but by increasing concentration it will lead to more economic uncertainty; a cartel might reduce oligopolistic uncertainty, but it creates new strategic possibilities of contractual deviation.[433] More importantly, many agreements represent competitive situations in which the supposed gains in contractual certainty do not correspond to the economic reality. For example, vertical relationships usually do not lead to the creation of market power.[434] Hence, the terms of the vertical agreement might be set by the market and, therefore, deviation is irrational because it will only lead to the finding of another partner. Such agreements simply regulate the terms of a collaboration from which no guarantee against uncertainty is sought, given or needed.

The difficulties of basing collusion on the reduction of uncertainty represent the problems with a 'jurisdictional' concept. As previously discussed, a 'jurisdictional' concept attempts to formulate a neutral notion of collusion in order to delegate the substantive assessment for the condition of restriction of competition. However, in defining collusion Odudu cannot help but to be orientated by whether collusion is 'capable of causing the substantive harm [Article 101] seeks to guard against' – hence the economic reduction of uncertainty caught by exchanges of information. Regardless of whether this capability translates into actual harm, there is no question that it is substantively inspired. In order to be truly 'jurisdictional', collusion has to have no relation to the harm – such as the limitation of contractual freedom in relation to restrictions of competition which, as referred in Chapter II (on judging intent), the Commission employed pre-'modernisation' to bring as many agreements within the

[431] Monti (2007) 328.
[432] See Odudu (2006) 82, quoting *ICI* (fn. 493) 101.
[433] See Jones and Sufrin (2014) 660-663.
[434] See Whish and Bailey (2012) 624.

need of an Article 101(3) exemption.[435] Odudu attempts to do so by expanding the reduction of uncertainty into – truly neutral – contractual considerations, but then foregoes a coherent unitary notion of collusion. However, without substantive influence relevant under EU competition law, neutral 'jurisdictional' concepts become arbitrary.

ii. 'Pre-substantive' analysis

These problems with a 'jurisdictional' concept are avoided if collusion is indeed orientated by the substantive harm that Article 101 seeks to avoid. This is what Lianos does by rejecting a 'jurisdictional' concept, as noted above, and arguing that 'the concept of antitrust agreement should not be isolated from the meaning ascribed to the other elements of [Article 101], in particular the concept of restriction of competition'.[436] While this coincides with what is argued in this chapter in relation to the substantive value of intent, Lianos differs by arguing for an 'effects-based approach'. Hence, the pre-substantive analysis in collusion would represent the likelihood of anti-competitive effects. Lianos starts by noting that in economics collusion relates to supra-competitive prices, regardless of the behaviour at their origin.[437] Therefore, collusion would need 'to be treated less like the contract law idea of an "agreement" and more in keeping with the economics and the objectives of competition policy itself'.[438] Lianos remarks that converging interests in horizontal agreements lead to combined market power, while divergent interests in vertical agreements prevent it.[439] However, Lianos notes that, contrary to what the different interests would suggest, the notion of collusion is the same for horizontal and vertical agreements in the case law.[440] This is attributed to a 'formalistic' interpretation of the notion of agreement based on intent, coherently to how an 'effects-based approach' explains the Court's deviations from this standard.[441] If the effects on consumer welfare due to market power were taken in consideration, Lianos claims, horizontal agreements

[435] The inspiration for the term 'jurisdictional' is the best example, as many of the procedural criteria used to attribute competence to courts (nationality, territory, value of the interests, etc.) are unrelated to their substantive solution.
[436] Lianos (2008) 1029.
[437] Lianos (2008) 1028-1029.
[438] Lianos (2008) 1029.
[439] See Lianos (2008) 1032-1034.
[440] See Lianos (2008) 1035.
[441] See Lianos (2008) 1043-1045.

should be defined broadly while vertical agreement should be defined restrictively (namely based on coercion or induction).[442]

The use of an 'effects-based approach' for collusion, however, shows why those that argue for such an approach prefer to consider collusion 'jurisdictional'. The fact is that, as Lianos admits, the Court does not differentiate between establishing a horizontal and vertical agreement.[443] It will be seen below that such difference is only made in relation to concerted practices, and not because of market power considerations. By so clearly disregarding market power, as Lianos convincingly argues, the case law cannot be said to follow an 'effects-based approach'. Equally important, if such an approach were followed then the next step would be to consider parallel behaviour as collusive. The economic view which Lianos adopts does not distinguish between tacit and explicit collusion. It is precisely because of following an 'effects-based approach' that Odudu must consider collusion as a 'jurisdictional' concept, despite the above stated problems. An 'effects-based approach' can only justify that effects which are no different from a cartel escape Article 101 if they are precluded by a neutral 'jurisdictional' concept. If the pre-substantive analysis suggested by Lianos were adopted, this argument would no longer be available. This would require a re-working of the case law on parallel behaviour in addition to that on vertical agreements. This strays too far from the actual case law to provide a useful interpretation of Article 101.

It is argued that a unitary notion of collusion grounded on the principle of independence of economic action avoids the problems remarked so far.[444] Such notion of collusion would represent a substantive influence of the notion of restriction which, as Lianos argues in principle, would allow a coherent interpretation of Article 101. This does not apply to the 'effects-based approach' argued by Lianos only because, as developed in Chapter IV (on restrictions of competition), the restrictions by object concerned also fail to follow such an approach – like collusion, restriction by object disregard market power. Moreover, as Odudu's notion of reduction of uncertainty attempts to provide, the principle of independence of economic action allows a unitary notion of collusion which can be distinguished from parallel behaviour. As discussed in Chapter II (on judging intent), the 'double effect doctrine' explains that certain outcomes can be prohibited if intended but allowed if foreseen as a side-effect. That is the case when influencing other undertaking's economic independence. The notion of collusion under

[442] See Lianos (2008) 1076-1077.
[443] See Case C-260/09 P *Activision* 2011 I-419 71.
[444] This principle is not ignored by Lianos (2008) 1033 and Odudu (2006) 83.

Article 101 consists in such influence, either reflected in an undertaking's desires (agreements) or knowledge (concerted practices). As discussed in the next section, the principle of independence of economic action judges which influence is prohibited and which is accepted as part of normal market conditions.

Parallel behaviour is not caught under Article 101 because, as also discussed in Chapter II (on judging intent), it corresponds to the paradigm of undertakings acting independently. This is as much the case of undertakings following the market price in competitive markets as it is with members of an oligopoly adapting to a supra-competitive price. There is however one important characteristic of oligopolies: parallel behaviour might be an unintended side-effect of their operation, as undertakings use their market power to adapt to changing conditions, but might also be intended by undertakings through strategic action. In the latter case there is intent according to the 'doctrine of double effect', and therefore could potentially fall under Article 101. It is useful in this regard to consider the notion of collusion proposed by Kaplow in US antitrust.[445] Kaplow advances a 'subjective' notion which considers that oligopoly members can coordinate as effectively as if they communicated between themselves, communication being required by the 'objective' notion prevalent in US antitrust.[446] This is inspired by game theory, but veers into unwittingly applying the 'doctrine of double effect'. Thus, Kaplow argues that a practice making it easier for rivals to coordinate will only be considered collusive if that is its primary purpose.[447] Therefore, practices which only produce coordination as a side-effect, even if foreseeable, are excluded under Kaplow's notion.[448] This notion could be applicable to EU competition law which, contrary to US antitrust, is intent-based and follows the 'doctrine of double effect'.

However, the case law appears to reject strategic action by undertakings in an oligopoly should be considered as collusion. In *Suiker* the Court made a broad allowance for undertakings' 'right to adapt themselves intelligently to the existing and anticipated

[445] See Page (2013) 222-232, who conveniently summarises Kaplow's position as stated in several sources.
[446] See Page (2013) 222-225.
[447] See Page (2013) 225, quoting Kaplow's statement that 'practices that may facilitate oligopolistic interdependence but would likely be employed regardless are not directly probative'.
[448] Kaplow appears to unduly limit the exclusion to facilitating practices, when the reasoning is equally applicable to other types of strategic action. Because of not expressly applying the 'doctrine of double effect', Kaplow is forced to deal with the alignment that also occurs in competitive markets by excluding from his notion the collusion which results in competitive prices, see Page (2013) 228-229. This proves the undoing of Kaplow's notion since, as Page notes, introducing the question of whether the price resulting from collusion is efficient may easily lead to false negatives and is normatively incompatible with allowing monopoly pricing, see Page (2013) 238-247.

conduct of their competitors' must be read carefully, considering that the same right under Article 102 does not always allow a dominant undertaking to make such basic adaptations as matching the price of competitors.[449] Contrary to what Odudu assumes, this is not related to acting rationally.[450] As stated in Chapter I (on the concept of intent), the assumption of rationality underlies the interpretation of undertakings' actions. The rationality of reacting to a price communicated in advance is the same as reacting to a price set by the market. Ultimately, it is the principle of independence of economic action which determines which type of influence is normatively accepted.[451] The Court has thus decided to allow strategic action by undertakings to influence each other in oligopolies. This is normatively coherent with the limited application of exploitative abuses under Article 102 noted in Chapter II (on judging intent); indeed, it would only become a problem if an 'effects-based approach' were followed, as already remarked. More importantly, it is not an isolated instance but an example of normative decision being made under the principle of independence of economic action, like several others detailed below which include or exclude certain types of intended influence. All that it requires is that the Court considers that strategic competition is normatively acceptable in oligopolistic markets.[452]

2. Specific forms of collusion

Agreements, concerted practices and decisions by an association of undertakings are all situations where the independent economic action of an undertaking has been influenced by other undertakings or their association. This can be referred to as 'common intent', but as Black notes intention can only refer to one's own actions.[453] Therefore, in order to find collusion it is first necessary to first examine an undertaking's intent and consider the origin of its beliefs and desires. If an undertaking acts on beliefs and desires which are the influence of another undertaking, there is collusion. The forms of collusion represent different types of influence: agreements on

[449] See *Suiker* (fn. 419) 174 and *France Télécom* (fn. 24) 47.
[450] See Odudu (2006) 87.
[451] Of course, once the consequences of an infringement of Articles 101 and 102 are factored in, no adaptation which is considered anti-competitive can be held to be rational.
[452] This does not exclude that other substantive decisions compensate this, such as a lower requirement for anti-competitive exchanges of information, see *T-Mobile* (fn. 73) 34. The present research will not cover the possibility (until now, still theoretical) of using collective dominance under Article 102 to prohibit exploitative parallel behaviour in oligopolies.
[453] See Black (2008) 115 and see Odudu (2006) 61.

desires, concerted practices on beliefs (with associations of undertakings, as stated above, being differentiated on the associative background of the influence). This is captured in the Court's statement in *Suiker* that:

> '[the] requirement of independence […] strictly preclude[s] any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market'.[454]

The Court refers to both direct 'influence' and indirect one by disclosing 'the course of conduct' on the market. Agreements constitute direct influence, by setting out desires on how undertakings should act. Concerted practices represent indirect influence, by disclosing information which is integrated as beliefs on which undertakings act. The case law that a strict characterisation is unnecessary reflects the fact that the two are often mixed. For example, a concerted practice is motivated by the desire that undertakings act on the information exchanged, while an agreement to exchange information involves such disclosure. Any agreement will involve its set of beliefs and concerted practice its underlying desires. The characterisation of collusion as any of these forms relies on whether beliefs or desires are more important for the influence to be exerted. This characterisation does not correspond to any degree of influence of the collusion itself: as developed below, agreements may either be automatically considered binding or they may require examining compliance, while concerted practices sit in the middle under a rebuttable presumption of subsequent behaviour on the market.

Once influence is found, it is subject to a 'pre-substantive' analysis under the principle of independence of economic action. The above reference in *Suiker* to the 'object or effect' indicates how the finding of collusion is similar to that of a restriction of competition. Despite the case law not developing this distinction, some influence can be said to be by 'object', meaning intentional and implemented (capable of producing effects), while other influence is by 'effects', meaning actual or likely influence (regardless of intention).[455] For these purposes, in another similarity with restrictions of competition, it is necessary to assess the degree of influence taking the aims, the

[454] *Suiker* (fn. 419) 174.
[455] In *Bayer* (fn. 118) 96-97 the Court rejected tying the notion of agreement to a party 'demand[ing] a particular line of conduct' in favour of a 'common intention [for the parties] to conduct themselves', which appears to encompass both object and effect.

undertakings and the economic and legal context into account.[456] This substantive judgement based on the principle of independence of economic action is the difference with 'jurisdictional' approach of connecting agreements with offer-acceptance and concerted practices with contact which is generally accepted by the doctrine. Thus, as developed below, agreements are defined as a 'concurrence of wills' but involve other instances of influence judged negatively (i), while concerted practice nominally cover any type of contact but do not apply to many such instances where influence is not judged negatively (ii).

i. Agreements

As quoted from *Bayer* above, agreements are defined as a 'concurrence of wills' which, regardless of form, expresses the parties' intention'.[457] Although intention can be defined in relation to both beliefs and desires, as discussed in Chapter I (on the concept of intent), the reference to 'will' indicates that agreements are concerned with desires. This does not require reciprocal desires on both parties: it is enough for an agreement if a single undertaking's desires are influenced by another undertaking. What matters is whether the desire is the result of such influence, and not a mere coincidence of both undertakings' motivations.[458] Contracts are the paradigmatic agreements, where undertakings formalise their influence through enforceable legal obligations.[459] Implementation appears to be subject to a legal presumption in contracts, namely that they are in any event capable of influencing undertaking's desires.[460] Other situations which have been considered agreements under Article 101 – cartels, 'gentleman's agreements', simple understandings, protocols, expired agreements, partial agreements, guidelines, circulars, etc. – all relate to a finding of influence: it is clear how undertakings are intended to act or that effect is caused. In *Bayer* the Court described

[456] See C-74/04 P *Volskwagen* [2006] I-6585 45. Coherently with a 'jurisdictional' concept, Odudu (2006) 89 argues that context should not be taken into account, further demonstrating that such concept is not adopted in the case law.
[457] See *Bayer* (fn. 118) 69.
[458] See Black (2008) 112-113. It is common in independent decision-making, in particular when formulating strategies, to assume or desire that other undertakings act in a certain manner.
[459] See Black (2008) 114.
[460] As Whish and Bailey (2012) 100 state, 'a legal contract of course qualifies as an agreement', going on to give the examples of other agreements referred below.

the process of intentional influence as 'an invitation to the other party, whether express or implied, to fulfil [an anti-competitive] goal jointly'.[461]

The case law on agreements has been mostly dedicated to demonstrating this influence in situations where it is not formalised. If an undertaking's intent is interpreted as acting on a desire which it should not normally have, namely going against its interests, it can be attributed to another undertaking's influence. However, influence can also be felt when undertakings' interests match, as horizontal agreements best demonstrate. The difficulty lies in distinguishing what appears to be unilateral action within an existing relationship from the influence which such relationship involves.[462] The case law has assumed such influence if the matter falls within the terms of the relationship, while new terms have to be expressly accepted or tacitly interpreted from actions.[463] In *AEG*, the Court considered as part of a selective distribution agreement the refusal to supply price-cutting distributors.[464] Despite this not being expressly stipulated in the agreement, it was considered to fall within the relationship since it was in the interest of all the participants. In *Ford*, the Court considered as part of a distribution agreement the refusal to supply distributors which could re-sell into other areas.[465] Even though the refusal harmed those distributors, the existence of an agreement (the contractual relationship) was not disputed.[466] Finally, in *Bayer* distributors also had their quantities limited in order to prevent re-selling into other Member States. The Court inquired whether the supplier had influenced the distributors, as quoted above, and if the latter 'shared the intention […] to prevent parallel imports'.[467] The Court concluded that the distributor's actions could not be interpreted under the desire to restrict parallel trade, which in any event the supplier had not sought to influence.[468]

The case law shows that the existence of acceptance, tacit or not, is a matter of evidence of influence and not a substantive requirement. *Bayer* did not stray from this framework: it simply involved contradictory evidence, namely distributors which continued in a relationship even though they were not influenced in relation to their

[461] *Bayer* (fn. 118) 102. This assumes that collusion is directed at a restriction by object (since there are no anti-competitive goals in restrictions by effect), again showing how the two conditions are linked.
[462] See Jones and Sufrin (2014) 155-163 and Whish and Bailey (2012) 105-110.
[463] See Souto Soubrier (2007) 109. The case law before *Bayer* will not be examined in detail, since authors agree that *Bayer* sets the current standard while using the preceding case law to argue for opposite views, see Lianos (2008) 1038 and Odudu (2006) 65.
[464] See Case 107/82 *AEG* [1983] ECR 3151 38.
[465] See Cases 228-229/82 *Ford* [1984] ECR 1129 12.
[466] As Whish and Bailey (2012) 106 comment, the issue was not the existence of an agreement but its exemption under Article 101(3).
[467] See *Bayer* (fn. 118) 120-121.
[468] See *Bayer* (fn. 118) 122-123.

parallel trade. This means that if the Court had reached the opposite result, judging that an agreement existed from an interpretation of the relationship, this would have also have been coherent with that framework. Indeed, that is what happened in the subsequent *Activision*, where the Court found that the influence to restrict parallel trade was compatible with covert sales by distributors.[469] However, the doctrine has considered that *Bayer* pins down the notion of agreement to an offer-acceptance model of contract law. Odudu has considered offer-acceptance as a 'jurisdictional' concept. As contract law requires 'a definite offer by one party, and an equally definite acceptance of that offer by another party', so would EU competition require 'communication (offer) and commitment (acceptance)'.[470] Black has also argued that agreements 'are best understood in terms familiar from the law of contract', namely offer-acceptance.[471] Black grounds this view on the linguistic meaning of agreement, of which contract law would constitute the paradigm and which 'concurrence of will' would constitute a 'clumsy' expression.[472] Even Lianos, despite criticising *Bayer*, states that the Court adopted a 'formalistic definition of the concept of agreement as the meeting of an offer with an acceptance'.[473]

The doctrine has nonetheless been too quick to draw a notion of agreement requiring offer-acceptance, as this notion does not fit with the whole of the case law. The link with contract law, although important for neutral 'jurisdictional' purposes, leads to the already encountered problem of delegating to another field of law choices which are substantively important for EU competition law. As Lianos comments, 'because the aims of competition law are not similar to those of contract law, the requirement of concurrence of wills or mutual consent fulfils a different objective and should therefore be interpreted differently from contract law'.[474] It is true that the existence of a contract is sufficient to find an agreement, as non-legally binding 'gentleman agreements' are. However, this must not lead into a false sense of familiarity. The Court has warned in *BNIC* that 'the legal framework within which […] agreements are made and such decisions are taken and the classification given to that framework by the various national legal systems are irrelevant'.[475] A contractual model cannot frame many of the types of agreement established in the case law without gross distortion of what is

[469] See *Activision* (fn. 443) 81-82.
[470] Odudu (2006) 61.
[471] Black (2008) 114.
[472] Black (2008) 112.
[473] Lianos (2008) 1047.
[474] Lianos (2008) 1036.
[475] Case 123/83 *BNIC* [1985] ECR 391 17.

'offered' or 'accepted'. For example, a partially negotiated contract is only accepted under the condition of its full conclusion (or else there would be a regular contract already); abiding by contracts that have expired, even if accepted, is never formally offered. Odudu's reference to 'communication (offer)' is simply evidence of influence, while 'commitment (acceptance)' is just one interpretation of an undertaking's behaviour as acting on a desire which is influenced.

The limitations of an offer-acceptance model become particularly clear when dealing with agreements under Article 101 which are considered unintended under contract law. First, 'mental reservation' is a way to withhold acceptance, for example participating in a meeting but not abiding by the resulting agreement, yet it is no obstacle to finding an agreement under Article 101.[476] There is no question that 'mental reservation' does not prevent influence.[477] Second, it is established case law that coercion is no defence for the existence of an agreement under Article 101.[478] Black notes the contradiction between the case law on coercion and an offer-acceptance model, but does not resolve it.[479] Odudu claims that 'coercion does not vitiate acceptance; it does not matter why an offer is accepted, just that it is accepted – even if unwillingly'.[480] However, the concept of 'unwilling acceptance' is paradoxical (and difficult to separate from the reaction to unilateral action). It is one thing for an undertaking to consider advantages and (threatened) disadvantages, and it is another for an undertaking to be coerced into acting with no reasonable possibility of refusing. EU competition law does find an agreement like Odudu describes, but not because there is any acceptance. As Lianos points out, such acceptance is ruled out by the contract law from which Odudu draws the concept.[481] What coercion undoubtedly represents is influence over independent economic action.[482]

The substantive judgment involved in the interpretation of the notion of agreement confirms that it does not follow a 'jurisdictional' concept of offer-acceptance. Contrary

[476] See *Anic* (fn. 422) 96. Souto Soubrier (2007) 97 proposes a test for 'mental reservation' based on the behaviour observed by third parties at the time of the agreement, but this again is evidence of influence (which should not be limited to the time of the agreement).
[477] See Cases C-204-205, 211, 213, 127 and 219/00 P *Aalborg* [2004] ECR I-123 82. Hence, as referred in Chapter I (on the concept of intent), the need for public distancing to show that the influence could not produce effects. Even if 'mental reservation' were accepted, if the undertaking acted according to information received it would be liable to be considered a concerted practice.
[478] See Cases 100-103/80 *Musique Diffusion Française* [1983] ECR 1825 90 and Lianos (2008) 1049.
[479] See Black (2008) 113.
[480] Odudu (2008) 62-63.
[481] See Lianos (2008) 1035.
[482] It appears that, as Black (2008) 108-109 fears, the notion of agreement has departed from its everyday meaning and adopted a telic character specific to EU competition law.

to what Lianos holds, the case law has not 'emphasized the jurisdictional character of the concept of agreement'.[483] This interpretation stems from an 'effects-based approach' that doubts whether 'a test focusing on the intention of the parties, as defined by a declaration of will or a pattern of conduct' can relate to consumer harm.[484] Hence, the use of intent can only be 'formalistic'.[485] However, Lianos also argues that the notion of agreement had been 'instrumental' to the goal of market integration, and attributes *Bayer* to a shift in policy.[486] If so, then *Bayer* would be a continuation of a 'pre-substantive analysis', since a 'jurisdictional' concept does not contemplate policy shifts. In any event, this shows the instability of reading of the case law under an 'effects-based approach', which has to posit outcomes not explicitly reasoned by the Court. As held above, a 'pre-substantive analysis' has indeed been followed but in relation to the principle of independence of economic action, which provides the normative connection between *Bayer* and the remainder of the case law on agreements.[487]

ii. Concerted practices

It was quoted above that concerted practices are defined as a form of collusion by which undertakings 'knowingly substitut[e] practical cooperation between them for the risks of competition'.[488] By referring to 'knowingly', the Court indicates that the intent behind concerted practices involves beliefs, as opposed to the desires that orientate agreements. As such, undertakings act on their own desires in concerted practices, but based on beliefs which are the influence of other undertakings. This corresponds to the indirect influence described in *Suiker* of disclosing 'the course of conduct which [undertakings] have decided to adopt or contemplate adopting on the market'.[489] The same logic

[483] Lianos (2008) 1040-1041.
[484] Lianos (2008) 1044, reading *Bayer* as capturing intent as a 'state of mind' detached from economic incentives, a notion which, as discussed in Chapter I (on the concept of intent) and also argued by Lianos, does not correspond to the approach of EU competition law.
[485] See Lianos (2008) 1047.
[486] See Lianos (2008) 1037 and 1047-1048.
[487] Monti (2007) 41-44 also argues that the notion of agreement has been influence by market integration. Although this is possible, the principle of market integration has not been expressly referred to by the Court and appears to play no role in other situations where it could have a substantive impact, notably favourable view the parent-subsidiary relationships in *Consten and Grundig* noted above.
[488] *ICI* (fn. 493) 64.
[489] *Suiker* (fn. 419) 174. Whish and Bailey (2012) 113 state that *ICI* and *Suiker* 'provide the legal test of what constitutes a concerted practice for the purpose of Article 101: there must be a mental consensus whereby practical cooperation is knowingly substituted for competition'. The mental consensus must relate to information, since a 'concurrence of wills' on intention is covered by agreements.

applies to other information, such as cost structures or changes in productive assets. What is relevant is that the undertaking acquires the information by virtue of influence of other undertakings, thereby interfering with its independence of economic action. Concerted practices have additionally been defined based on subsequent behaviour in the market, but such behaviour is presumed once influence has been found.[490] As seen above, subsequent behaviour is also required in agreements lacking sufficient formalisation of influence, and presumed if there is one. Without a similar clear reference, concerted practices have come to depend on contact between undertakings as proof of influence, relying on the Court's statement in *Suiker* that independence of economic action 'strictly preclude[s] any direct or indirect contact'.[491]

The case law reference to 'any direct or indirect contact' has also been incorporated in a 'jurisdictional' notion of collusion based on the reduction of uncertainty. As discussed above, Odudu proposes such a notion as an alternative to agreements and concerted practices both expressing common intent. However, as is also discussed above, reduction of uncertainty proves a poor fit for agreements in competitive markets, in particular vertical relationships. Most of Odudu's treatment of reduction of uncertainty is therefore dedicated to concerted practices.[492] Disclosure of information does indeed reduce economic uncertainty in oligopolies, but this shows a 'pre-substantive analysis': when such a concerted practice is found, it also constitutes a restriction of competition. For example, in *Hüls* the Court considered the only defence by the undertakings involved in an exchange of information was to show that their behaviour had not been affected – if not, the existence of a restriction by object was unavoidable.[493] In order to get around this, Odudu is forced to first tie concerted practices to contact, and then define contact broadly enough so as to include competitively neutral situations. As to the first, it is stated that '[c]ommunication reduces uncertainty and evidence of communication seems sufficient to establish a concerted practice'.[494] As to the second, Odudu quotes *Suiker* in order to reject any limitation based on whether the information

[490] See *T-Mobile* (fn. 73) 52 and Jones and Sufrin (2014) 166-167. As discussed in Chapter I (on the concept of intent), this relates to the interpretation of actions of based on the beliefs and desires allocated to undertakings, in this case those acquired through collusion.
[491] *Suiker* (fn. 419) 174. As stated, decisions by associations of undertaking might involve the indirect influence of concerted practices, in which case such influence is formalised.
[492] See Odudu (2006) 81-86.
[493] See Case C-199/92 P *Hüls* ECR I-4287 162-167.
[494] Odudu (2006) 84.

was sought or accepted.[495] According to Odudu, '[a]ll communication should evidence concerted practice if the jurisdictional function of the collusive terms is accepted'.[496]

It is important to underline how wide the scope is of a 'jurisdictional' conception relying on 'all communication'. To begin with, it does not consider whether uncertainty would exist absent the communication, or whether the type of information is likely to lead to anti-competitive harm, since those are substantive issues – all that matters is that some information is communicated.[497] This covers any information which is released to customers, sales agents and press, since it can find its way to competitors.[498] In *Wood pulp* the Court considered that disclosing this information did not constitute a concerted practice.[499] However, according to Odudu, this was a (substantive) issue of causality: no matter what could be done, customers would always reveal their deals in order to obtain better conditions.[500] Information was undoubtedly disclosed, so *Wood pulp* would be explained by '[t]he absence of causation, rather than the absence of collusion'.[501] Moreover, the context in which information is disclosed would according to Odudu also be a substantive issue.[502] This means that whether the communication is made in a horizontal or vertical relationship would be irrelevant, treating meetings with competitors in the same manner as meeting with customers.[503] Odudu admits that all this 'perhaps casts the net too wide, enabling undertakings to unwittingly become party to a concerted practice'. However, Odudu reasons, undertakings are also unwittingly caught in coerced agreements.[504]

It is argued that a 'jurisdictional' conception of concerted practices is out of touch with the case law and practical needs. If contact were widened to the extent proposed by Odudu, collusion would lose its function as a distinctive condition. The premise that 'all communication should evidence concerted practice' would make it practically impossible to escape Article 101. Undertakings are not economic islands, and they continually broadcast information on their offers, acquisitions and strategies to their customers, partners and investors. In Odudu's conception, only information kept internally would escape being considered collusive. Even if this wide scope is embraced

[495] See Odudu (2006) 86.
[496] Odudu (2006) 90.
[497] See Odudu (2006) 87-88.
[498] See Odudu (2006) 88.
[499] See Cases C-89, 104, 114, 116-117 and 125-129/85 *Wood Pulp* [1993] ECR I-1307 175-197.
[500] See Odudu (2006) 88-89.
[501] Odudu (2006) 89.
[502] See Odudu (2006) 89-90.
[503] See Odudu (2006) 90.
[504] Odudu (2006) 86.

by a 'jurisdictional' perspective, it would wreak havoc in separating collusion from unilateral action under Article 102 TFEU. A dominant undertaking's strategies are usually communicated in some way to its customers or the press. The strategy followed in *Bayer* of limiting supplies was undoubtedly communicated to distributers, and according to Odudu this contact would be enough to establish collusion. If this were true, the efforts by the Court to define the notion of agreement would turn out to be pointless. As Lianos comments, 'it does not make much sense to develop a restrictive and legalistic definition of the concept of agreement while expanding, at the same time, the concept of concerted practice'.[505]

More important than not corresponding to the case law, it is further submitted that a 'jurisdictional' conception fails to grasp the case law's normative significance. The above stated argument by Odudu, justifying the wide scope of concerted practices on undertakings also being caught in coerced agreements, is exemplary. Those two situations can only be understood by considering them as normatively opposite. In coerced agreements, the Court is forced to step out of the definition of agreements as 'concurrence of wills' in order to encompass situations which are judged negatively. In concerted practices, the Court limits the definition of concerted practices as involving 'any direct or indirect contact' in order to exempt public announcements and communications with customers because it judges them positively.[506] Even if these naturally influence competitors, they are part of the paradigm of a competitive market on which the principle of independence of economic action is grounded (as well as being necessary for competition on the merits).[507] If this 'pre-substantive' analysis was abandoned, and a 'jurisdictional' concept adopted, coerced agreements would escape an offer-acceptance model (which as seen above is incompatible with 'unwilling acceptance') while parallel behaviour would be caught as indirect contact (since it is the product of strategic communications to the market). Vertical relationships would lose the more favourable treatment that they currently enjoy from a restrictive notion of agreement accompanied by a restrictive application of concerted practices.[508] Despite

[505] Lianos (2008) 1051.
[506] Odudu's argument that these would be excluded through causality is hardly compatible with the presumption of subsequent market behaviour established in *T-Mobile* and, in any event, would not apply to the situations of parallel behaviour which is effectively caused by strategic communications.
[507] These communications are not exempted in themselves, but because under the 'double effect doctrine' their influence is considered as a foreseen side-effect. If an undertaking were to intend such influence, for example by making a public announcement solely to signal competitors, the definition of concerted practices as 'indirect contact' would apply.
[508] The conclusion by Lianos (2008) 1035 that the concept of collusion is the same for horizontal and vertical relationship focuses excessively on agreements.

the claims that a ‘jurisdictional’ concept of collusion should have no substantive impact, it is clear that it would.

3. Conclusion

This chapter discussed how the notion of collusion applies the principle of independence of economic action to judgments of intent. The alternative proposed by some authors is to consider collusion as a neutral ‘jurisdictional’ concept separated from the substantive analysis under the condition of restriction of competition. This is particularly important for an ‘effects-based approach’: the only possibility to justify that parallel behaviour is not caught under Article 101, having the exact same effects as cartels, is to exclude such behaviour before any substantive analysis is engaged. However, when defining such a notion of collusion, authors cannot avoid but to use some substantive criteria related to the possibility of competitive harm, otherwise the ‘jurisdictional’ concept becomes arbitrary and disconnected from EU competition law. This results in mixing contradictory elements, such as the reduction of economic and contractual uncertainty, or the plain recognition that the case law on collusion does not follow an effects-based criterion of harm – which, as is developed in Chapter IV (on restrictions of competition), is coherent with the application of restrictions by object. In contrast, a ‘pre-substantive’ analysis under the principle of independence of economic action provides a coherent notion of collusion. Collusion is intended to influence independence of economic action, while such influence in parallel behaviour is usually a side-effect of an oligopoly context. Economics does not differentiate between these two situations, but EU competition law does according to whether influence is intended or merely foreseen.

The specific forms of collusion, in turn, correspond to different types of influence. Agreements are direct influence, whereby undertaking act according to desires which are influenced by other undertakings. This covers the formalisation of influence under contracts or the interpretation of behaviour under informal influence, such as that of a business relationship. Concerted practices are indirect influence, whereby undertakings act on information disclosed by other undertakings which is presumed to influence them. These notions provide a better normative explanation of the case law than the ‘jurisdictional’ concepts, generally accepted in the doctrine, of agreements as offer-

acceptance akin to contract law and concerted practices as any communication between undertakings. Offer-acceptance can hardly explain situations of coerced agreements, which are particularly important as exercises of market power. Capturing any communication is too wide, covering several aspects of normal competition such as public announcements and meetings with customers. Those situations, in turn, are compatible with a normative judgment on the type of influence exercised: negative in the case of coercion, positive in the case of public announcements and meetings with customers. Because there is no 'jurisdictional' separation, the finding of collusion might have important consequences for the finding of a restriction of competition. Those consequences, however, are normatively consistent across the conditions of Article 101.

CHAPTER IV

Restrictions of competition

The previous chapter examined the notion of collusion, which determines which behaviour falls within the scope of Article 101 by judging the intent to influence under the principle of independence of economic action. The present chapter will turn to the role of intent in determining whether collusive behaviour is anti-competitive.[509] Article 101(1) refers to different forms of collusion having 'as their object or effect the prevention, restriction or distortion of competition within the internal market', which will simply be referred to as restrictions by object or effect.[510] While intent is always relevant when establishing collusion, its normative value varies according to the type of restriction. As stated in Chapter II (on judging intent), intent may aid interpreting or predicting the effects necessary for restrictions by effect. Because the normative value of intent in that case is subordinate to effects, it will not be discussed. The present chapter will focus on restrictions by object, and the subordinated role also attributed to intent by an 'effects-based approach': certain types of agreement (defined by intent) would lead to a presumption of anti-competitive effects, and restrictions by object would be based on the risk of such effects. This chapter will argue, to the contrary, that restrictions by object are based on a moral judgment of intent. This judgment does not depend on a typology of agreements, but tests intent in its legal and economic context. Such judgment might be a continuation of the 'pre-substantive' analysis of independence of economic action used to find collusion, or involve the further consideration of the principles of market integration or competition on the merits.

The Court has long defined restrictions by object in alternative to restrictions by effect.[511] As observed in Chapter II (on judging intent), an 'effects-based approach' has understood this as an alternative between effects-based rules and a standard.

[509] This is commonly associated with use, by the Commission and the Courts of the EU, of internal documentation and undertakings' statements. As discussed in Chapter I (on the concept of intent), this so-called 'subjective intent' does not correspond to the notion of intent, and is simply evidence which may be used to prove intent for the purposes of establishing a restriction.

[510] The distinction between the different forms of collusion will not, in principle, be relevant for the present chapter. Hence, 'agreement' may be used for all those forms, considering that most of the case law and doctrine quoted refers to agreements.

[511] See *Glaxo* (fn. 28) 55 and *BIDS* (fn. 25) 15.

Restrictions by object would presume effects, while restrictions by effect would apply a standard of actual or likely effects.[512] This understanding has been reinforced by the Opinion of AG Kokott in *T-Mobile*, which states in relation to restrictions by object:

> 'The per se prohibition of such practices recognised as having harmful consequences for society creates legal certainty and allows all market participants to adapt their conduct accordingly. Moreover, it sensibly conserves resources of competition authorities and the justice system'.[513]

As discussed in Chapter II (on judging intent), the advantages of legal certainty and ease of application are associated with the application of rules. Therefore, authors argue, the advantages attributed by AG Kokott would come from presuming effects and not having to prove them to the standard of restrictions by effect.[514] For example, Bailey states that '[i]f an agreement is likely to be harmful to competition, there is little to be gained for the law to insist on the competition authority (or claimant) proving that outcome'.[515] This, however, assumes that the stated advantages can only be explained by the presence of rules. The case law definition of restrictions by object refers to no such rules:

> 'certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'.[516]

Restrictions by object apply a standard of what is 'injurious to the proper functioning of normal competition', which requires the moral judgment of intent. The advantages of restrictions by object come from this moral judgment, not from a presumption of effects. As developed below, the presumptions of effects argued by an 'effects-based approach' are associated with price-fixing and market-sharing.[517] It is cartels that authors have in mind when speaking of the advantages of restrictions by object, not the other agreements which Bailey calls 'divisive'.[518] However, it is to cartels that a 'pre-substantive' analysis described in Chapter III (on collusion) applies more aptly: once collusion has been found, a restriction by object always follows. That is what happened in *T-Mobile*: an exchange of information was considered a concerted practice and a

[512] In reality restrictions by effect depend heavily on rules, from economic and intent-based presumptions of effects to the exclusion of an innumerable number of situations as *de minimis*, see Commission Notice on agreements of minor importance which do not appreciably restrict competition under [Article 101(1)] OJ C 368, 22/12/2001, p. 13 ('*De minimis* Notice') 3 and 7, but this is will not be covered.
[513] Opinion *T-Mobile* (fn. 73) 43.
[514] See Whish and Bailey (2012) 119.
[515] Bailey (2012) 566.
[516] *Allianz Hungária* (fn. 103) 35, citing *BIDS*, *T-Mobile* and *Expedia*, which will all be analysed below.
[517] See Guidelines on Article 101(3) 21.
[518] Bailey (2012) 559 and 567 mentions 'horizontal price fixing agreements' as the example for the above quote, despite introducing restrictions by objects as 'divisive'.

restriction by object, and undertakings were left with rebutting the presumption that their behaviour had not been affected.[519] These offences to the principle of independence of economic action lead to legal certainty and ease of application because they are intuitive and morally consensual.[520] The case law dispenses with effects because intent is enough to judge them anti-competitive.[521]

The supposed advantage of restrictions by object not having to prove effects is circular: if object and effect are a true alternative, then there is as much of an advantage in not having to prove effects as there is in not having to prove object. Any advantage rests on the assumption that finding one is easier than another. Although restrictions by effect may involve difficult evidence, notably in relation to 'complex economic assessments' which are subject to limited judicial review, conceptually they are simple.[522] As described in Chapter II (on judging intent), an 'effects-based approach' provides a way to determine which effects are relevant and how to balance them with reference to the goals of EU competition law. Restrictions by object would indeed be easier to apply if they relied on presumptions of effects which formalised previous balancing exercises. However, for such presumptions to operate they would need to be consistently triggered by the same factors. An 'effects-based approach' assumes that this happens with qualifying agreements as certain types, such as price-fixing or market-sharing. However, as described below, the Court has insisted that the intent of the agreement must always be considered in its context, and backed that with instances where even price-fixing or market-sharing have not been considered restrictive. Those instances cannot be explained by rebutting a presumption of effects, which is nowhere established by the case law, or by the risk of such effects.

Only moral judgments can differentiate the instances where price-fixing or market-sharing have not been considered restrictive from the situations to which restrictions by object so easily apply. This chapter will, therefore, start by discussing how the moral judgments of intent interact with a typology of restrictive agreements (**1.**). It will then analyse the doctrinal view that restrictions by object are based on the risk of anti-competitive effects (**2.**). The rejection of an 'effects-based approach' in favour of a

[519] See *T-Mobile* (fn. 73) 61.
[520] This is what is referred to in Chapter II (on judging intent) as 'reflective equilibrium' between the intuitions of the 'double effect doctrine', which apply to intentional collusion, and consensual moral convictions, which were seen to support the independence of economic action.
[521] Kaplow (1992) 596-598 states that standards might be more certain and easier to enforce if based on common knowledge in comparison with complex technical rules. The latter applies to the economic analysis required by restrictions by effect, while this chapter will show that the case law on restrictions by object does not follow the same efficiency considerations.
[522] See *Aalborg* (fn. 477) 279 and Jones and Sufrin (2014) 1037.

moral judgement will then be confirmed in a more detailed examination of the case law (**3.**). A table with the case law examined will also be presented (**4.**).

1. The moral judgment of intent

This section will examine how restrictions by object judge intent under the principles of independence of economic action, of market integration and of competition on the merits. This judgment will be confronted with an 'effects-based approach' that holds that restrictions by object involve a presumption of the same anti-competitive effects which fall under restrictions by effect.[523] For example, Odudu states that '[b]oth the object and the effect assessment share a single conception of restriction of competition'.[524] This approach relies on the Commission's stated position post-'modernisation' that:

> 'Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying [Article 101(1)] to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market […]. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources [and] to a reduction in consumer welfare'.[525]

This position is quoted approvingly in the doctrine, as it connects restrictions by object to the likelihood of anti-competitive effects (defined according to the goals of EU competition law, namely efficiency and consumer welfare), which in turn is presumed from agreements like price-fixing and market-sharing – the 'effects-based approach' epitomised. [526] However, the Commission's position distorts the notion of restriction by object given by the Court. Where the Court mentions 'injurious to the proper functioning of normal competition', as quoted above, the Commission adds a 'high

[523] It could be argued that a restriction under Article 101(1) is 'presumed' to be an infringement unless exempted under Article 101(3), see Jones and Sufrin 82014) 194. However, there is no such presumption since the Article 101(3) does not rebut Article 101(1), it exempts the behaviour – the restriction to competition remains, but it is outweighed by other benefits.
[524] Odudu (2008) 13. See also Chalmers, Davies and Monti (2010) 986-987.
[525] Guidelines on Article 101(3) 21, see also Communication from the Commission – Guidelines on the applicability of Article 101 OJ C 11, 14/01/2011, p. 1 3.
[526] See Bailey (2012) 562-563 and Odudu (2008) 13.

potential of negative effects'. The two are not the same: one is a moral judgment, the other a presumption of effects. If the case law had adopted such a presumption, then the situations where an 'object'-type agreement is not considered restrictive would correspond to a rebuttal.[527] Jones and Sufrin comment that, while the economic and legal context should be able to provide such rebuttal, 'this argument appears to have been accepted by the General Court, but not the Court'.[528]

This section will begin by examining the typology of agreements considered restrictive by object and how this has been reflected in the case law of the General Court (i). A presumption of effects will then be critically assessed under the case law of the Court (ii). This will clear the way for analysing restrictions by object as a moral judgment of intent grounded on several principles of EU competition law (iii). The section will then discuss the role of context and justifications in this moral judgment (iv).

i. The 'object box' and *European Night Services*

If restrictions by object are considered presumptions, they must be triggered by certain stable factors. These factors have been doctrinally developed around a typology of agreements, ostensibly influenced by cartel activity. Cartels provide a consensual example of restrictions by object. As Whish and Bailey comment, '[h]orizontal agreements between independent undertakings to fix prices, divide markets, to restrict output and to fix the outcome of supposedly competitive tenders are the most obvious target for any system of competition law'.[529] Thus, as quoted above, when the Commission defined restrictions the (non-exhaustive) examples that followed were price-fixing and market-sharing.[530] Such is the opprobrium that cartels carry that it seems that the qualification of restriction by object follows automatically from 'price-fixing' or 'market-sharing'. The General Court and some authors have taken this notion of cartels as the template for other restrictions by object, which would aim to achieve the same level of definition and censorship.

[527] See Chalmers, Davies and Monti (2010) 987.
[528] Jones and Sufrin (2014) 222-223.
[529] Whish and Bailey (2012) 513.
[530] The Commission has also defined several 'hardcore restrictions' in Block Exemption Regulations, but those bear no connection with the finding of a restriction, only with its exemption, see *Pierre Fabre* (fn. 132) 32.

According to this view, the definition of restrictions by object would result from a process similar to US antitrust, not in substance but in method, where the case law and doctrine would fine-tune the definitions of different types of agreements presumed to lead to anti-competitive effects.[531] As such, Whish and Bailey have proposed an 'object box' of evolving borders which identifies 'particularly pernicious types of agreement that are overwhelming likely to harm consumer welfare'.[532] The majority of the types of agreement in this 'object box' correspond to variations of cartels activity: 'to fix prices', 'to exchange information that reduces uncertainty', 'to share markets', 'to limit output' and 'to limit sales'.[533] The remaining types of agreement pose specific competitive problems, particularly if they involve issues of market integration, but may also be used to enforce cartels: 'collective exclusive dealing', 'to impose fixed or minimum resale prices' and 'to impose export bans'.[534]

The General Court has expressly adopted the notion of restrictions by object as presumptions of effects in its case law. In *Glaxo* the General Court stated that 'agreements intended to limit parallel trade […] may be presumed to deprive final consumers of those advantages'.[535] Coherently with such presumption, the General Court considered on the facts of the case that 'if account is taken of the legal and economic context [of the agreement], it cannot be presumed that those conditions deprive the final consumers of medicines of such advantages'.[536] As already referred, the Court reversed *Glaxo* on appeal, considering that the General Court committed an error of law in not considering the aim to limit parallel trade as restrictive by object regardless of effects on consumers.[537] Nonetheless, an 'effects-based approach' survived *Glaxo* because the Court's judgment can be interpreted as presuming another type of effects, namely on the competitive process, instead of rejecting the presumption in itself (although the Court gave no indication of this, in particular by outlining how this other presumption could be rebutted). In any event, *Glaxo* shows the perils of defining restrictions by object outside consensual cartel activity.

[531] See Whish and Bailey (2012) 124.
[532] Whish and Bailey (2012) 121. The reference to the goal of consumer welfare does not prevent that the types of agreements in the 'object box' are supposed to be consensual like cartels.
[533] Whish and Bailey (2012) 124.
[534] Whish and Bailey (2012) 124. Ibáñez Colomo (2012) 553-554 speaks of a 'vertical price fixing fetish' in relation to the continued link between resale price maintenance and cartels, a link which would have been severed in US antitrust.
[535] Case T-168/01 *Glaxo* [2006] ECR II-2969 121.
[536] GC *Glaxo* (fn. 535) 122.
[537] *Glaxo* (fn. 28) 62-64.

It is therefore necessary to analyse the presumptions made by the General Court in relation to such activity, and other analogous activities, as 'obvious restrictions of competition'. In *European Night Services* the General Court stated that there were two ways of finding restrictions by object:

> 'account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned […] unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets'.[538]

The significance of the step taken by the General Court must be highlighted. It is one thing for the doctrine to catalogue agreements which have been considered restrictive under an 'object box'; it is another to create a legally binding rule that any such agreements are presumed restrictive. *European Night Services* was not appealed, and the doctrine has not contested it.[539] Considering that most of the Article 101 litigation before the General Court results from leniency applications involving cartels, one can see why this jurisdiction would be accustomed to 'obvious restrictions of competition'.[540] From there to establishing presumptions is a small step. The originality of the General Court was taking 'price-fixing' and 'market-sharing', also referred by the Commission as leading to a presumption of effects, and grouping them with a vague 'control of outlets', which the General Court does not define.

The view that restrictions by object represent presumptions based on a typology of agreements is compelling. Not only would it align the practice of the US and the EU, it would facilitate the application of Article 101(1). For purposes of the present research, it would give intent a prominent role. Unlike other contracts, cartels rarely have written provisions, so they are usually found based on the intention of the parties. Moreover, the purpose of categorising them as 'obvious restrictions of competition' is, as can be seen from the passage of *European Night Services* quoted above, to escape having to analyse the economic and legal context. This leaves intent as the unifier between different individual restrictive schemes. In other words, what makes several agreements fall under an agreement in the 'object box' – price-fixing, market-sharing, export ban, etc. – is their intent to achieve this effect, not whether that effect results from the economic

[538] Cases T-374-375, 384 and T-388/94 *European Night Services* [1998] ECR II-3141 136.
[539] Whish and Bailey (2012) 121-122 comment that 'without using the [same] terminology […], it seems clear that the General Court considered that agreements of this nature should be allocated to the object box'.
[540] Dubious cases would correspond to types of agreement at the border of the 'object box'. Bailey (2012) 572-573 mentions that restrictions by object would include but not be exhausted by agreements which are obviously harmful.

and legal context. However, as discussed next, there is little support in the law of the Court for attaching presumptions to a typology of agreements.

ii. The standard set by the Court

It appears that the General Court overstepped its competence in *European Night Services*. There is little, or no, support for the creation by a lower instance of any rule – including the qualification as 'price-fixing' or 'market-sharing' – that bypasses an individual analysis of the factors set out by the Court in its case law. This is irrespective of the terminology of *European Night Services* having slipped into *KME*, where the Court stated that effects do not have to be taken into account in restrictions by object, as is established in case law, but then added that this 'applies in particular in the case, as in this instance, of obvious restrictions of competition such as price-fixing and market-sharing'.[541] Against the words in *KME*, not yet repeated by the Court, sits the full weight of the case law on restrictions by object. It is recognised in the doctrine that many agreements which would qualify as price-fixing, market-sharing or the control of outlets were found not to be restrictive under Article 101(1) by the Court. Ibáñez Colomo lists price-fixing in *Gøttrup-Klim*, restriction of output in *Tournier*, and exclusive territorial protection in *Coditel II*, *Nungesser* and *Erauw-Jacquery*.[542] The reasons advanced by the doctrine for doing so are discussed below, but it is consensual that this involved a consideration of the agreements' economic and legal context.

It is argued that the mere fact that context is taken into account by the Court shows that the qualification as a type of agreement is not enough to find a restriction by object. Under *European Night Services*, the finding of price-fixing, market-sharing or control of outlets would have been sufficient. The agreements in those judgments, naturally, were not 'obvious restrictions of competition', but the question is how such a conclusion can be reached without considering their economic and legal context. To hold that such consideration is necessary would of course defeat the purpose, clearly stated by the General Court, of establishing a presumption precisely to ignore context. Therefore, the only way to save a presumption of effects is to speak, like Bailey does, of

[541] Case C-389/10 P *KME* [2011] ECR I-13125 75.
[542] See Ibáñez Colomo (2012) 547 and Whish and Bailey (2012) 125, adding export bans in Case C-306/96 *Javico* [1998] ECR I-01983.

'context exclud[ing] a *prima facie* finding of a restrictive object'.[543] However, this *prima facie* finding lacks the legal value attributed to presumptions: the case law shows no indication of a reversal of the burden of proof.[544] In fact, the case law does not allow for a second assessment based on context after a finding of a restriction by object.

Hence, the Court has rejected that restrictions by object consist of a rebuttable presumption of effects. In the Opinion in *T-Mobile*, AG Kokott stated that restrictions by object 'may not be interpreted as meaning that an anti-competitive object gives rise merely to some kind of presumption of unlawfulness which may be rebutted, however, if in the specific case no negative consequences for the operation of the market can be demonstrated'.[545] According to AG Kokott, considering effects in this manner would be contrary to the distinction between object and restrictions by effect.[546] The Court followed the Opinion of AG Kokott, stating that 'there is no need to consider the effects of a concerted practice where its anti-competitive object is established'.[547] The cases cited show that this was not particularly novel, as the consideration of any effects – including their absence – has been precluded since *Consten and Grundig*.[548] Since a presumption of effects must be rebuttable by showing the absence of effects, precluding the consideration of effects is the same as denying that such a presumption exists.[549]

By not following *European Night Services*, regardless of whether it involves a presumption of effects or not, the Court has not acted exceptionally but applied a standard which it has consistently enforced. The Court has stated that:

> '[i]n order to determine whether an agreement involves a restriction of competition "by object", regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part'.[550]

As stated in Chapter II (on judging intent), this indicates the operation of a standard, not rules. Restrictions by object cannot be triggered by a type of agreement: the Court is

[543] Bailey (2012) 583-585.
[544] Whish and Bailey comment that 'it is possible to argue successfully that restrictions which are necessary [for] a legitimate commercial purpose fall outside Article 101(1)', but do not indicate whether the Commission can ignore these arguments if the parties do not provide evidence as they must do to obtain an exemption under Article 101(3).
[545] Opinion *T-Mobile* (fn. 73) 45.
[546] Opinion *T-Mobile* (fn. 73) 45.
[547] *T-Mobile* (fn. 73) 30.
[548] See *T-Mobile* (fn. 73) 29 and the Opinion *T-Mobile* (fn. 73) 42.
[549] Odudu (2006) 123-124 holds that *ex ante* presumptions must be rebuttable, while *ex post* the issue is no longer relevant as unsuccessful attempts should also be punished. Whether restrictions by object correspond to the equivalent of a legal presumption of the risk of effects, also argued by AG Kokott in the Opinion in *T-Mobile*, is discussed below.
[550] *Allianz Hungária* (fn. 103) 36, citing *BIDS*, *T-Mobile*, *Expedia*, *Glaxo*, *Premier League* and *Pierre Fabre*.

adamant that they involve an assessment of all of the agreement's provisions, objectives and context. Indeed, as noted above, this standard emerged to counter the Commission's pre-'modernisation' practice of only considering whether the freedom of the parties was restricted – precisely the sort of context-ignoring rule which the General Court attempted to create in *European Night Services*. The standard set by the Court necessarily brings the analysis down to an individual agreement. In Chapter I (on the concept of intent) it was established that the agreement's objectives are the parties' intent. Therefore, the intent to fix prices, share markets or impose export bans is very relevant. Nonetheless, the qualification as a putative type of agreement has no legal value and is really not the issue. This is overlooked when cartels are used as the template for restrictions by object. The adage goes that 'hard cases make bad law'.[551] Nonetheless, 'soft cases' of cartels obscure the fact that a restriction by object is the result of a particular context, not of a qualification that bypasses such context.[552]

The 'hard cases' where intent and context are carefully considered, which will be analysed in detail below, provide a better representation of restrictions by object. Naturally the Court – but not the General Court – is free to institute interpretive rules. As will also be seen, the Court has done so within the standard of 'injurious to the proper functioning of normal competition', by establishing precedent on certain intent (the legality of exclusive distribution allowing parallel imports) and context (the irrelevance of sector crisis).[553] Perhaps *KME* is an indication that the Court will consider presumptions for price-fixing or market-sharing, having ignored the ill-conceived and vague 'control of outlets' employed by the General Court. However, this would constitute a significant reversal of the Court's case law. Until this reversal is clearly expressed, *KME* is better read as an accidental reference to which the Court will not return (and it has not, so far). *KME* concerned an appeal from the General Court which did not contest the existence of a restriction by object. The reference to 'obvious restrictions of competition' was made in relation to the increase of the fine by the Commission according to the cartel's duration, and it should be confined to such facts.[554]

[551] See Justice Holme's dissent in Northern Securities Co v United States, 193 US 197, 400 (1904).
[552] As discussed below, that context involves both a horizontal competitive relationship and the absence of judgment that the agreement is not part of the 'proper functioning of normal competition'.
[553] See Case 56/65 *STM* [1966] ECR 234 and the discussion of *BIDS* below.
[554] *KME* (fn. 541) 65 states in full: 'For the purpose of applying [Article 101], there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition […]. That applies in particular in the case, as in this instance, of obvious restrictions of competition such as price-fixing and market-sharing. If a cartel determines the

The conclusion that the presumptions established by the General Court in *European Night Services* are misconceived helps to clarify the notion of restriction by object. The doctrine is of course aware of the standard set by the Court, but is currently forced to reconcile it with *European Night Services*. This leads to paradoxical statements such as Bailey's assertion that 'the case law makes it clear that certain forms of agreement cannot be automatically classified as an object restriction in every case'.[555] If an agreement is classified automatically as an object restriction, by definition it is so classified in every case. The doctrinal reconciliation attempted is to apply presumptions by analogy to the types of agreement in the 'object box', while the Court's standard is only applied to individual agreements in the absence of precedent.[556] Nonetheless, there is no reason to conduct this separation. The Court's standard also makes use of analogy with its previous case law. Furthermore, the Court certainly did not present its standard as subsidiary to the General Court's presumptions.

The reluctance to question the validity of *European Night Services* stems from its importance for an 'effects-based approach', since it is a prominent example of a 'more economics' approach to EU competition law and the only judicial formulation of anything coming close to a presumption of effects.[557] As already noted, such rules would line up neatly with the *per se* prohibitions of US antitrust. Nonetheless, this system does not seem appropriate for EU competition law.[558] Private enforcement in the US leads to a multitude of cases testing the appropriateness of rules, gaining experience as jurisdictional steps are climbed. Public enforcement in the EU requires top-down rules which guide administrative action from the start.[559] Therefore, it can be concluded that there is no rule under Article 101(1), such as the one proposed by the General Court in *European Night Services*, whereby the qualification as a certain type of agreement leads to a restriction by object.[560] Each agreement must be assessed individually according to the factors indicated in the standard set by the Court, even if it can be

---

state of the market at the moment it is agreed, its lengthy duration can make the structures of that market more rigid, reducing cartel participants' incentive for innovation and development. A return to free competition will be all the more difficult and protracted, the longer the cartel continues'.

[555] Bailey (2012) 561.

[556] See Bailey (2012) 571-576 and 576-585 on the distinction between 'identifying object restrictions by reference to examples or decided cases' and 'ascertaining the objectives of the agreement in its surrounding context'. This also corresponds to the alternative proposed in GC *European Night Services* (fn. 538) 136.

[557] See Odudu (2008) 13, and the difficulty in providing authority for this presumption beyond the above quoted Commission position.

[558] See Jones and Sufrin (2014) 231.

[559] Bailey (2012) 564 admits that experience plays a comparatively limited role in EU competition law.

[560] This includes the types given in Article 101(1) itself, see Whish and Bailey (2012) 122.

qualified as price-fixing or market sharing.[561] The interpretation of these factors is of course open to analogy with previous judgments, and thus doctrinal classifications such as the 'object box' remain useful indicators – but only that.

iii. Principles of EU competition law

The standard set by the Court elucidates what factors must be considered for finding a restriction by object – the agreement's provisions, objectives and context – but it does not explain how to extract the agreement's anti-competitive nature from these factors. As stated at the beginning of this chapter, an 'effects-based approach' connects restrictions by object with the likelihood of anti-competitive effects, while the present research will argue that restrictions by object are moral judgments of intent placed in its context. Intent must always be considered since the agreement's objectives represent the parties' intent, as discussed in Chapter I (on the concept of intent), and such objectives are an indispensable part of the standard set by the Court.[562] This means that the case law that the parties' intention 'is not a necessary factor', but can be relied upon, should be limited to the use of internal evidence like documentation and statements, as also discussed in Chapter I (on the concept of intent).[563] As such, if undertakings claim that their intent when entering into an agreement was to pursue certain objectives, the Commission is forced to examine this claim. If it does not, it will fail to properly motivate its decision; if it refuses to examine the claim by holding that intent is unnecessary for finding a restriction by object, it will be committing an error of law.[564]

The first step of finding a restriction by object is to consider whether the intent of the agreement falls within the scope of a principle of EU competition law. The moral judgment can only take place once context is considered, which is discussed below. Although these steps can be separated analytically, they are not in practice. As seen in Chapter III (on collusion), the finding that intent has been influenced by another

[561] In cases involving preliminary references the Court often refers to types of agreements, since it is prevented from conducting a factual analysis of a single agreement, but the characteristics (as a matter of law) of the 'type' described are always the exact ones of the agreement at issue.
[562] An agreement's provisions also show intent, insofar as they detail the parties' beliefs and desires. Nonetheless, considering that concerted practices do not have written provisions, it is best to consider the agreement's provisions as a form of evidence of intent rather than a substantive criterion.
[563] See *Glaxo* (fn. 28) 58.
[564] It is open to the Commission, however, to reject certain objectives as being legally irrelevant according to precedent set by the Court or because there is insufficient evidence of such intent.

undertaking goes together with judging such influence, according to its context, under the principle of independence of economic action – which can carry through to the notion of restriction. However, if there is no influence of the intent, there is no judgment. Therefore, intent must first fall within the scope of the principle. Other than the principle of independence of economic action, restrictions by object can also be grounded on the principles of market integration and competition on the merits. The application of these principles confirms the normative value of intent. Whish and Bailey state that restrictions by object are 'clearly inimical to the objectives of the EU'.[565] As discussed in Chapter II (on judging intent), this does not involve a consideration of effects in relation to the goals of EU competition law, which is covered by restrictions by effect, but an application of principles which represent the values of the EU.

The operation of principles explains several characteristics of restrictions by object. First, it is only because the Court is making a normative judgment on principles that it offers so little explanation on the anti-competitive nature of restrictions by object. That nature is extracted from a background of EU law values which are assumed to be known and shared. This reasoning would not be possible if, as an 'effects-based approach' holds, restrictions by object involved a consideration and balancing of effects on EU competition law goals. Even though the case law can always be artfully interpreted in this manner, it would not be proper for the Court not to make its policy reasoning based on effects explicit. Second, principles also justify why restrictions by object do not depend on iterative design according to experience but 'top-down' definition by the Court. Finally, principles explain why, despite restrictions by object and effect being presented in the alternative by the case law, object is always considered first.[566] This shows normative precedence, not practical expediency, particularly when reviewing Commission decisions that conduct both an object and effects analysis, effectively dispensing with the usefulness of presumptions.

The principle of independence of economic action judges the intent to change competitive parameters (price, output, distribution, innovation, etc.). As discussed, this principle applies to the finding of collusion. In some situations this 'pre-substantive' analysis is enough to also find a restriction, namely horizontal agreements or concerted practices covering how cartels normally operate: price-fixing, bid-rigging, exchange of

[565] Whish and Bailey (2012) 121.
[566] See *Glaxo* (fn. 28) 55.

information, etc.[567] However, in other situations the finding of a restriction involves a separate analysis. This is necessary when applying restrictions by effect or other principles, but may also happen in relation to a more in-depth analysis of contested or unclear cases of influence, particularly in vertical relationships (such as resale prices or 'hub-and-spoke schemes'). When a restriction is found, as also noted above, the Court may use the same language as for the finding of collusion, since the principle remains the same. Thus, in *BIDS* the Court conducted a separate analysis (since an agreement was not in doubt) and found that the intent to reduce overcapacity 'conflicts patently with the concept inherent in the [Treaty] provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt'.[568] By definition, the lack of intent to change competitive parameters will also lead to the lack of collusion.

The principle of market integration judges intent such as preventing parallel trade or national boycotts. Once collusion has been found, the purpose of the influence is assessed in relation to market integration.[569] This is also a goal of EU competition law, so effects on market integration are caught by restrictions by effect. Nonetheless, as Bailey comments, '[i]t is generally sufficient […] to find that an agreement seeks to prevent parallel trade in order for it to have a restrictive object'.[570] Therefore, it is the intent to restrict parallel trade which is being normatively considered, not its effects. As noted in Chapter II (on judging intent), there appears to be a deontological duty against such intent. This makes the seminal cases on parallel trade, like *Consten and Grundig*, as much the product of EU law values as an attempt of defining those values by the

[567] Whelam (2013) 559 argues that the moral wrongness of cartels is akin to stealing, but a right to the consumer surplus captured by cartels is difficult to differentiate from regular market power, in addition to the question of effects being irrelevant. Nevertheless, Whelam (2013) 60 also admits that cartels as cheating 'captures the full extent of cartel activity', which is closer to the conception of direct influence argued in Chapter III (on collusion). This solves the difficulty Whelam has in finding an 'unfair advantage' in comparison to rule-abiders: it allows the transaction of an asset – the influence – which is prohibited and has a market value, as shown by the price of merger acquisitions. In any event, Whelam's analysis sticks close to criminal law concept of intent (to which it is directed), which might raise the difficulties noted in Chapter I (on the concept of intent) and Chapter II (on judging intent) with transposing it to the looser framework employed by EU competition law.

[568] *BIDS* (fn. 25) 33-34. As discussed in Chapter I (on the concept of intent), the reference in *BIDS* (fn. 25) 21 to the lack of 'subjective intention of restricting competition' must be read as knowledge of illegality, since it was established that the intent was to reduce overcapacity. Curiously, the parties based their defence on 'obvious restrictions of competition', arguing that: '[o]nly agreements as to horizontal price-fixing, or to limit output or share markets, agreements whose anti-competitive effects are so obvious as not to require an economic analysis come within [restrictions by object]', see *BIDS* (fn. 25) 22.

[569] As referred in Chapter III (on collusion), it does not seem that the principle of market integration influences has expressly influenced the notion of agreement, although Lianos (2008) 1037 has argued so under an 'effects-based approach'.

[570] Bailey (2012) 566.

Court.[571] The connection between the intent to prevent parallel trade and the principle of market integration was made explicit in *Glaxo*:

> 'With respect to parallel trade, the Court has already held that, in principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition […]. […]
>
> The Court has, moreover, held […] that an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market'.[572]

Despite their pedigree, judgments relying on the principle of market integration tend to be seen as almost an anomaly by the doctrine. For Bailey, they would constitute policy judgments impinging on the economic consensus and experience that would otherwise connect restrictions by object to the risk of effects.[573] For Ibáñez Colomo, they are an exception to the lack of an efficiency explanation used to characterise restrictions by object.[574] Nonetheless, a notion of restriction by object which files judgments such as *Consten and Grundig* and *Glaxo* as exceptions cannot but appear dubious. Instead of looking at the principle of market integration as a justification for deviating from an 'effects-based approach', those judgments should be seen as establishing that restrictions by object are based on intent.

As a result of its deontological and foundational character, only rarely will a judgment of intent under the principle of market integration be affected by context. For example, the intent to isolate a national market was sufficient to find a restriction in *Coop de France* despite the claims of a sector crisis.[575] This does not however prevent the argument that there was no intent, as demonstrated by *STM* and *Javico*.[576] These judgments show that the 'doctrine of double effect' is a better explanation of the case law than a typology of agreements. *STM* is often quoted in relation to restriction by effects, but this is only because the Court found no restriction by object: when examining whether exclusivity 'is to be considered as prohibited by reason of its object or of its effect', the Court considered that the agreement did not intend to limit parallel

[571] See *Consten and Grundig* (fn. 85) ECR 343. The Court describes the restriction in terms of intent throughout the judgment, namely that 'the applicants wished to eliminate any possibility of competition at the wholesale level', how products were 'intended for the area covered by the contract', and that the trademark arrangement was 'intended to increase the protection inherent in the disputed agreement', see *Consten and Grundig* (fn. 85) ECR 342-343.
[572] *Glaxo* (fn. 28) 59 and 61.
[573] See Bailey (2012) 565.
[574] See Ibáñez Colomo (2012) 552-553.
[575] See Cases C-101/07 P and C-110/07 P *Coop de France* [2008] ECR I-10193 83.
[576] *Javico* (fn. 542) 19.

imports in order to focus on its effects.[577] Some limitation of market of integration is a foreseen effect of exclusivity, but the fact that the agreement expressly allowed for parallel imports showed this was unintentional.[578] *Javico* dealt with an export ban, a type of agreement already considered restrictive in *Consten and Grundig*. However, because the export ban was imposed outside the EU, the Court stated that it 'must be construed as not being intended to exclude parallel imports and marketing of the contractual product within the [EU]'.[579] Again, the export ban could prevent re-importation and therefore harm parallel imports.[580] The Court nevertheless considered this as an unintended side-effect of the objective to 'enable the producer to penetrate a market outside the [EU] by supplying a sufficient quantity of contractual products to that market'.[581]

The principle of competition on the merits applies to the intent to directly harm competitors, as discussed in Chapter II (on judging intent), such as denying access to a selective distribution network or targeted boycotting. For example, in *Pierre Fabre* the Court considered that a selective distribution network was restrictive by object, the same way that in *Protimonopolný* it agreed with such a characterisation of a targeted boycott.[582] These are all situations where the agreement is intended to inflict some sort of direct harm (selective refusal or boycott), which can be distinguished under the 'double effect doctrine' from indirect harm – namely exclusion which is merely foreseen to result from arrangements intended to increase sales and improve vertical relationships, which are considered compatible with competition on the merits. Chapter V (on abuse of dominance) will develop this difference in relation to abuses of direct and indirect harm, which is of greater importance than in relation to collusion. First, cases where a dominant undertaking intends to harm a competitor are more common than agreements to do so. Second, it will be argued that indirect harm is better covered by tests of effects, a situation which can already be said to prevail under Article 101. For example, the exclusion resulting from aggregated exclusivity obligations was examined as a restriction by effect in *Delimitis*, showing the lack of intent to directly harm competitors.[583] Thus, restrictions by object are limited to situations where the

[577] *STM* (fn. 553) ECR 250.
[578] See *STM* (fn. 553) ECR 247 and the description by the referring Court that the agreement did not prevent parallel imports.
[579] *Javico* (fn. 542) 19.
[580] See Bailey (2012) 575.
[581] *Javico* (fn. 542) 19.
[582] See *Pierre Fabre* (fn. 132) 39 and Case C-68/12 *Protimonopolný* [2013] nyr 35.
[583] See Case C-234/89 *Delimitis* [1991] ECR I-935 27. Monti (2013) 495-496 also argues that restrictions by object based on selective distribution have not been concerned with effects, and suggests applying the

intent to exclude is judged contrary to the principle of competition on the merits. In this regard, the production of effects is deemed irrelevant – whether the competitor excluded from a selective distribution system or targeted by the boycott is viable has not been considered relevant by the Court in finding a restriction by object.

Classifying intent according to the above principles might prove more useful than a typology of agreements such as the 'object box'. Both classifications are intent-based and provide an indication of restrictive nature which must be confirmed according to context. However, as noted above, the only link between the agreements in the 'object box' appears to be cartel activity. Although identified as 'overwhelming likely to harm consumer welfare', which is contentious both factually and under the goals of EU competition law, agreements are allocated to the 'object box' on a case-by-case basis.[584] Inside the 'object box', they are only linked by their vertical or horizontal character. Considering the principles advanced here has several advantages. First, it becomes clear what principles link agreements of very distinct characteristics, such as a vertical export ban in *Consten and Grundig* and a horizontal import ban in *Coop de France*. Second, once those links are clear one can avoid casuistic enumerations, such as the ways in which cartels can manipulate competitive parameters (price, sales, output, tendering, etc.). Third, those links also provide a clear indication of what agreements might in the future be considered restrictive, overcoming the recognised limits of an analogy with a typology of agreements.[585] Finally, a classification based on principles can incorporate the fact that, even though a restriction might be dismissed based on context, the underlying intent is still potentially offensive. For example, the intent to fix purchasing prices can still be considered restrictive despite the fact that, as examined below, no restriction was found in *Gøttrup-Klim*.

---

same criteria than under Article 102. However, as developed in Chapter V (on abuse of dominance) and contrary to what Monti states, this should not lead to a test of likelihood of anticompetitive effects, but to the distinction between direct and indirect harm currently applied by the Court under both Articles 101 and 102.

[584] See Whish and Bailey (2012) 121-125; the same can be said of the list provided by Jones and Sufrin (2014) 206.

[585] See Bailey (2012) 574-575.

iv. Context

Like the agreement's objectives, its economic and legal context is also part of the standard set by the Court. Thus, it is always considered, even if implicitly. Other times, it can be formalised into justifications which apply to both restrictions by object and effect. As described above, an 'effects-based approach' assumes that certain types of agreement are presumed restrictive. Cartels and export bans would set out to directly contravene EU competition law, so a legal presumption would be appropriate. These agreements are sometimes called 'naked' restrictions, since they would not offer any countervailing benefit.[586] However, according to that argument, intent would be incapable of explaining more complex situations.[587] As will be discussed below, only by looking at context would it be possible to anticipate a risk of anti-competitive effects or consider possible efficiencies. Therefore, restrictions by object would be based on effects, except when it is a waste of resources to investigate them (cartels) or they are exceptionally precluded by market integration (export bans). It was already seen that no such rules apply and that intent must always be considered; it is now necessary integrate context, not in an 'effects-based approach', but in the moral judgment of intent.

Context provides the deciding feature of moral judgments. As seen in Chapter II (on judging intent), under the 'double effect doctrine' the same action and consequences can be judged as intentional or not depending on context. Once intent has been found, context continues to be relevant in judging it. Different behaviour is expected of different entities and of different circumstances. This is particularly clear under Article 102 in relation to the 'special responsibility' of dominant undertakings, as will be seen in Chapter V (on abuse of dominance). It also applies under Article 101 where, as Bailey states, 'EU Courts engage in a judgment as to how much the conduct deviates from the competitive norm'.[588] The case law where types of agreements usually considered restrictive, like price-fixing or export bans, were found not to infringe Article 101 based on their context will be discussed in detail below. For the moment, it should be noted that this conception is reflected in the case law definition of restriction by object. By appealing to the 'very nature' of the agreement, the Court indicates that the restriction is based on intent; by mentioning the 'proper functioning of normal

[586] See Ibáñez Colomo (2012) 549 and Jones and Sufrin (2014) 220.
[587] See Ibáñez Colomo (2012) 547-548.
[588] Bailey (2012) 560.

competition', it implies that context must be considered.[589] What is considered the 'proper functioning' of a market will depend on circumstances and normative choices.

As such, context is always considered, even if in different guises. A restriction can simply be found or rejected, without context appearing to play a role beyond the description given, or there can be a two-step reasoning where the potential for intent to offend an EU competition law principle is first stated and then assessed in its context. Finally, the Court can formalise rules whereby a certain context can dismiss the finding of a restriction. When those rules apply both to restrictions by object and effect, they will be referred to as 'justifications'. Moreover, context can appear to alternate between the objective and subjective. Legal and economic context is objective, but as discussed in Chapter I (on the concept of intent), a strategy necessarily incorporates context. Therefore, intent is also characterised by beliefs and desires related to context. For example, an undertaking might not merely seek to ban exports, but to prevent an existing parallel trade. Context can be seen in the intent in *BIDS* of 'remedying the effects of a crisis in the sector'.[590]

A consequence of context always being considered under the standard set by the Court is that, contrary to what some authors hold, there are no so-called 'naked' restrictions where a restriction by object is found solely on intent. For example, export bans are described by Ibáñez Colomo as 'naked' restrictions, but in *Consten and Grundig* the Court does not limit its reasoning to intent, stating that:

> 'in order to arrive at a true representation of the contractual position the contract must be place in the economic and legal context in light of which it was concluded by the parties'.[591]

Cartels are the typical 'naked' restriction, but as seen in Chapter III (on collusion) a 'pre-substantive' analysis of collusion – which might also determine the existence of a restriction – depends on an examination of context. Furthermore, whenever the existence of a restriction is contested the Court will also examine context. For example, in *BIDS*, an admitted restriction of output, the Court considered how the agreement affected the parties' profitability.[592] The Court will only skip examining context if it is procedurally prevented, namely by a reference from a national court or if the point is not raised on appeal from the General Court. Therefore, the conclusion that a restriction is

[589] See *Allianz Hungária* (fn. 103) 35.
[590] *BIDS* (fn. 25) 21.
[591] *Consten and Grundig* (fn. 85) ECR 343.
[592] *BIDS* (fn. 25) 35.

'naked' is misleading: there is a context which leads to such a strong normative reaction to the intent. Whenever an agreement is deemed to be a cartel, a moral judgment is made based on context which goes beyond the intent to fix prices or share markets.[593]

The context of 'naked' restrictions is, therefore, implicit. The intent to prevent parallel trade presupposes a context of national borders. Materially, these are simply areas of distribution which only become normatively relevant in that context.[594] Changes to competitive parameters are also only relevant in a context of competitive relationships. It appears trivial to state that cartels only take place between competitors in the same or related markets. However, the same parameters also change in agreements between non-competitors: a sales contract also has the intent 'to fix prices' of the sold good.[595] The established case law that not all limitations of independent economic action will be considered restrictive goes hand-in-hand with context.[596] The need for a competitive relationship explains why market definition is important, even for cartels, but also why it is not as important as for restrictions by effect.[597] The same happens with the demand under Article 101 that the restriction by object must be significant. The *de minimis* doctrine is of moral origin: the maxim from which it has taken its denomination ('*de minimis non curat praetor*') long predates the appearance of competition law. Therefore, whether a restriction by object is significant does not concern effects on the market, as will be discussed below, but moral appreciability.[598]

It must also be noted that judging intent in its context does not prevent the Court from referencing effects or consequences in its reasoning. As stated in Chapter I (on the concept of intent), intent can be characterised by desiring certain effects, and as discussed in Chapter II (on judging intent), it can be morally judged on that desire. Thus, the reference to effects is part of normal moral discourse. This must not be confused with attributing normative value to those effects, as restrictions by effect do. Such difference is illustrated in *BIDS* by comparing the arguments of the parties with

[593] As such, to say that cartels are restrictions by object is tautological: a cartel already presupposes the finding of a restriction.
[594] As stated in *Glaxo* (fn. 28) 61, it is not for private parties to restore the national barriers eliminated by the Internal Market.
[595] Thus, the aggregated effect of multiple contracts is considered under restrictions by effect, as seen in *Delimitis* (fn. 583) 27.
[596] As stated in Case C-309/99 *Wouters* [2002] ECR I-1577 97, 'not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in [Article 101(1)]'.
[597] Bailey (2012) 568-569 notes that the requirement to define markets has been somewhat relaxed in cartel cases. Considering that the objective is to identify competitive relationships rather than examine or anticipate effects, this relaxation would make sense.
[598] See Case C-226/11 *Expedia* [2012] ECR nyr 37.

the Court's reasoning. Both mention the consequences of the agreement. The parties focused on the economic and legal context in order to exclude any anti-competitive effects, arguing that:

> 'if an agreement does not affect the total output on a market or obstruct operators' freedom to act independently, any anti-competitive effect can be excluded. In the main proceedings, the withdrawal of certain operators from the market is irrelevant, because the stayers are in a position to satisfy demand'.[599]

In reply, the Court also mentions the consequences of the agreement but ignores its effects. The Court does so by incorporating such consequences in the intent, characterised as the desire to achieve a certain outcome. Namely, the Court expressly states that the agreements were 'intended to encourage the withdrawal of competitors' and 'intended to improve the overall profitability of undertakings' through specific objectives on number of undertakings and production capacity.[600] As the Court summarized:

> '[The agreements] are intended therefore, essentially, to enable several undertakings to implement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability by preventing them from achieving economies of scale'.[601]

As already remarked, the Court found that intending those consequences would offend the principle of independence of economic action.[602] In doing so, it rejected the context of a sector crisis as normatively relevant, stating that such context should instead lead to undertakings 'intensifying their commercial rivalry or resorting to concentrations'.[603] Whish and Bailey have held that this shows that 'an alternative, lawful, purpose' is not enough to save a restriction by object.[604] As the Court stated, an agreement might be restrictive 'even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives'.[605] If Whish and Bailey refer to 'lawful' in relation to other fields of law, their argument is confirmed by *BIDS*. However, it should be underlined that the illegality of the intent in *BIDS* was clearly established under Article

[599] *BIDS* (fn. 25) 25.
[600] *BIDS* (fn. 25) 31-32.
[601] *BIDS* (fn. 25) 33.
[602] See *BIDS* (fn. 25) 34.
[603] *BIDS* (fn. 25) 35.
[604] Whish and Bailey (2012) 119. Bailey (2012) 579 also observes, citing *BIDS*, that 'cases to date have tended to rely on evidence of subjective intent to condemn, rather than show that undertakings do not have the object of restricting competition'.
[605] *BIDS* (fn. 25) 21.

101 taking its context into account.[606] Other judgments are examined in detail below where the opposite result is reached, and context prevents intent from being considered a restriction by object.[607]

Finally, effects are also sometimes expressly stated in relation to justifications, but for different reasons. For example, in *Wouters* the Court stated that:

> '[for applying Article 101] account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability […]. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'.[608]

As in *BIDS*, the context in *Wouters* is taken into account subjectively as pursuing certain objectives. However, contrary to *BIDS*, the Court calls for an assessment of the effects of the practice as part of a legal test. It is submitted that this is because the justification in *Wouters* covers both restrictions by object and effect. Hence, in *Wouters* the Court did not even qualify the restriction at issue.[609] Since restrictions by object and effect are true alternatives, they are affected differently by justifications. A restriction by object might be wholly cleared based on contextual concerns related to the 'proper functioning of normal competition'. Anti-competitive effects, however, will only be cleared if they fall within the scope of the justification. This becomes even clearer in *Meca-Medina*, which underlines the obligation that such effects be proportionate to the concerns pursued.[610] Because justifications involve the normative value of both intent and effects, they will not be examined in detail by the present research.

[606] The use of the expression 'legitimate' by the Court appears to signal that the parties' objective might be viewed favourably under an Article 101(3) exemption or as an attenuating circumstance (or as a reason for State action).
[607] As also discussed below, these judgments are acknowledged by Whish and Bailey (2012) 129 as 'commercial ancillarity'.
[608] *Wouters* (fn. 596) 97.
[609] The Court mixes effects-based criteria, such as market concentration, with concerns about the proper functioning of the market typical of restrictions by object, see *Wouters* (fn. 596) 87-94.
[610] See Case C-519/04 P *Meca-Medina* [2006] ECR I-06991 42.

2. The risk of anti-competitive effects

This section will address the doctrinal view that restrictions by object represent a risk of anti-competitive effects. The previous section showed that restrictions by object do not depend on a typology of agreements, such as the one attributed to the Commission's position post-'modernisation' or the General Court in *European Night Services*. Notably, basing a presumption of anti-competitive effects on such typology of agreements has already led to the reversal of *Glaxo* on appeal and to the statement in *T-Mobile* that no such presumption exists. There is however another possibility of considering restrictions by object as based on anti-competitive effects. Rejecting the presumption in the Opinion in *T-Mobile*, AG Kokott proposed instead that a potential negative impact on competition would be sufficient – that is to say, that an agreement would be restrictive by object if it is capable of producing effects in its concrete context.[611] This is the origin of AG Kokott's analogy with the risk offence of driving under the influence of alcohol or drugs, already cited above.[612] An agreement capable of producing effects would be prohibited because of the risk of anti-competitive effects, regardless of whether those effects materialise or not. This is the major difference between the two ways of considering anti-competitive effects: the absence of such effects rebuts their presumption, but does not erase their risk.

The analogy between restrictions by object and risk offences has been well received in the doctrine.[613] This moves restrictions by object away from the presumptions of effects which, as seen in Chapter II (on judging intent), an 'effects-based approach' recognises but also attempts to avoid. The risk of anti-competitive effects could be extracted from the standard set by the Court, namely the agreement's objectives and context, which would then become the standard of likely effects that advocates of an 'effects-based approach' recommend adopting. There has also been some attempt to reconcile the risk of effects with the typology of agreements employed by the Commission and the General Court. Bailey presents both as instances of likelihood of anti-competitive effects derived from economic consensus and experience.[614] However, if agreements presumed to lead to certain effects are also considered to entail that risk with no

[611] Opinion *T-Mobile* (fn. 73) 46.
[612] Opinion *T-Mobile* (fn. 73) 47.
[613] See Whish and Bailey (2012) 118 and Bailey (2012) 563-564.
[614] See Bailey (2012) 562-564. Whish and Bailey (2012) 124 mention that agreements in the 'object box' do not cease to be considered restrictive if an individual case they do not have anti-competitive effects, which indicates they are not a presumption.

possibility of rebuttal, there is a legal presumption – for example, Bailey states that '[h]orizontal price fixing agreements are therefore deemed, by law, to restrict competition'.[615] The association with risk does not seem to overcome the objections set out in the previous section, which go beyond a presumption of effects. It is also not the same as the capability to produce effects described in the Opinion of AG Kokott, although it does fall close to the analogy made with risk offences. For the present purposes, however, it does not matter if the risk is taken from context or from the type of agreement, and if the latter is merely indicative or binding. Such risk can simply be assumed in order to assess whether it is coherent with the case law of the Court, namely the capability to produce effects in *T-Mobile* (i) and market power in *Expedia* (ii)

i. The capability to produce effects in *T-Mobile*

The Court followed the Opinion of AG Kokott in considering that, in finding a restriction by object, it is necessary only:

> 'that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market'.[616]

It is important to frame *T-Mobile* according to the analysis of previous chapters, which have indeed already made reference to this judgment. In Chapter I (on the concept of intent) it was stated that intent must be implemented in order to be legally relevant, preventing the sanctioning of intentions which are not acted upon. The standard of implementation is the capability to produce effects, as shown under Article 101 by this passage in *T-Mobile*. Furthermore, it was seen in Chapter III (on collusion) that implementation of concerted practices involves subsequent behaviour in the market. Again, *T-Mobile* was referred to as the source of the presumption that such market behaviour will follow a concerted practice.[617] Therefore, it is argued that when the Court states that a restriction has 'a negative impact', it is referring to the impact of intent which normatively offends the principles of EU competition law.[618] This is

[615] Bailey (2012) 567. See also Whish and Bailey (2012) 121.
[616] *T-Mobile* (fn. 73) 31.
[617] See *T-Mobile* (fn. 73) 52.
[618] The French version of this passage of *T-Mobile* is clearer, since it does not mention 'resulting in', which suggests causality of effects, but that the practice be capable of restricting competition: 'elle doit

'potential' because, as the Court states next, it involves a capability to produce effects in an individual case which is presumed in relation to the concerted practices at issue.

Such an interpretation is more laborious than simply accepting that the Court is referring to the risk of anti-competitive effects described by AG Kokott. The reasons why the Court did not refer to such risk, or indeed to effects, relate to the case law going back as far as *Consten and Grundig* which precludes the consideration of any effects. AG Kokott believes that an analogy with risk offences also respects this case law, but risk offences are based on the normative value of effects. Hence, authors arguing for an 'effects-based approach' have understood the Opinion in *T-Mobile* as another expression of need for the likelihood of anti-competitive effects. This is correct: risk offences are defined in relation to the probability of the relevant effects. As Dworkin states in more general terms:

> 'assignments of probability are indispensable to any genuine consequentialist analysis. It would be irrational for a pragmatist to compare two alternatives by comparing only the worst possible consequences of each, or only the best, or even only the most likely. He must compare the various possible consequences of each decision, taking into account their gravity, but discounting each by its probability'.[619]

In AG Kokott's analogy, driving under the influence of alcohol or drugs does lead to a high risk of an accident. Delicate estimates of probability are required to set the legal thresholds of alcohol consumption and a catalogue of prohibited drugs. The acts of drinking without driving, or driving without drinking, may also lead to accidents.[620] However, those acts are not prohibited. Risk offences do not aim to prevent all risky behaviour.[621] Therefore, it is not the capability to produce a negative effect which is relevant, but its probability. If restrictions by object are based on the risk of anti-competitive effects, they must do likewise. Namely, they must be tailored to capture situations with a high risk of anti-competitive effects and to exclude situations with a low risk of such effects.

---

simplement être concrètement apte, en tenant compte du contexte juridique et économique dans lequel elle s'inscrit, à empêcher, à restreindre ou à fausser le jeu de la concurrence au sein du marché commun'.

[619] Dworkin (2006) 97.

[620] Hence they involve some licenced activity, as opposed to economic activity which, as seen in Chapter II (on judging intent), may be a constitutional safeguarded right. That further shows how inadequate is AG Kokott's analogy.

[621] Assuming that the precautionary principle does not apply, which prohibits risky activities because the probability of harm in unknown. There is no indication that this principle applies to the infringement of EU competition law. On the contrary, as described in Chapter II (on judging intent), authors emphasise the unknown negative effects of chilling competition that over-enforcement might cause.

It is nonetheless clear that the capability to produce effects stated in *T-Mobile* does not correspond to a high risk of anti-competitive effects referred to in AG Kokott's Opinion. Despite agreeing that restrictions by object involve the risk of anti-competitive effects, Bailey admits that '[t]he test of capability appears to set the threshold for finding such infringements too low'.[622] The solution proposed by Bailey is to demand a 'high potential of harm for competition', tellingly supported by the presumption of anti-competitive effects stated by the Commission.[623] Nevertheless, Bailey's attempt to overcome *T-Mobile* by limiting it to the facts of a concentrated market is unconvincing. The language used by the Court is general and likely to be incorporated in other judgments, as already happened in *Allianz Hungária*.[624] Moreover, the capability to produce effects stated in *T-Mobile* has not been applied as an additional test of restrictions by object, but simply presumed – another indication that it does not represent the risk of anti-competitive effects but, as discussed in Chapter I (on the concept of intent), the implementation of a credible strategy. Thus, the better conclusion, and the only one supported by *T-Mobile*, is Bailey's initial one that the 'potential to have a negative impact on competition' is not the same as a high risk of anti-competitive effects.

ii. Market power in *Expedia*

In any event, it is argued that the risk of anti-competitive effects is not part of the standard set by the Court for assessing restrictions by object. The main factor in the analysis of anti-competitive effects, as the case law on restrictions by effect and the application of Article 101(3) shows, is the presence of market power. Intent may be used as a proxy for anti-competitive effects, but whether there is a risk of those effects or not depends on market power. Thus, any conception of restrictions by object as being based on a high risk of anti-competitive effects must incorporate market power if it wants to stay true to its purpose. The tools to consider such market power are already part of the standard set by the Court, namely the economic and legal context which is also stated in relation to restrictions by effect. Nevertheless, as Bailey comments, it is apparent that context is not used in the same manner: in restrictions by effect there is a

[622] Bailey (2012) 589.
[623] Bailey (2012) 589.
[624] See *Allianz Hungária* (fn. 103) 38.

'detailed market analysis', while in restrictions by object context 'has tended to be a subsidiary tool of analysis'.[625] In other words, market power has not been considered under restrictions by object, dispelling any notion that these are risk-based. This holds true regardless of any typology of agreements. It is uncontroversial that the effects of the fiercest price-fixing cartel can be made irrelevant by market forces.[626] Therefore, if restrictions by object were based on the risk of anti-competitive effects, market power would be the first and main factor that they would consider.

The importance of market power for restrictions by object is traditionally attributed to the *de minimis* doctrine. Influenced by the Commission's *De minimis* Notice, this doctrine was seen as dismissing a restriction by object or effect below certain market share thresholds.[627] However, the Commission excluded the application of its *De minimis* Notice to restrictions by object.[628] Authors nevertheless saw no other way but to use market shares after the Court found in *Völk* that an agreement with absolute territorial protection was not restrictive due to the 'weak position of the persons concerned on the market'.[629] The Court recently clarified whether restrictions by object could be *de minimis* in *Expedia*. Although denying any binding character to the *De minimis* Notice, the Court indicated that it could be considered in finding a restriction by effect.[630] When it came to restrictions by object, however, the Court reaffirmed the *Consten and Grundig* case law that effects are irrelevant.[631] Hence, the Court held that:

> 'an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition'.[632]

The finding a restriction by object has thus been disconnected from the demonstration of market power.[633] An agreement can therefore be found to be restrictive by object regardless whether it risks producing anti-competitive effects.[634] No risk offence would exclude considering a factor which indicates the absence of the risk. It is submitted that the definition of the *de minimis* doctrine in *Expedia* is incompatible with restrictions by

[625] Bailey (2012) 583.
[626] See Ibáñez Colomo (2012) 548.
[627] *De minimis* Notice 7. See Whish and Bailey (2012) 143.
[628] *De minimis* Notice 11.
[629] See Case 5/69 *Völk* [1969] ECR 295 302.
[630] See *Expedia* (fn. 598) 29-31. The Court did not mention restrictions by effect, but the exclusion of restrictions by object stated next makes it clear that such consideration could only be applied to them.]
[631] See *Expedia* (fn. 598) 35.
[632] *Expedia* (fn. 598) 37.
[633] See Jones and Sufrin (2014) 228 on whether *Völk* is overruled (it may still stand, since it involved such a small market share that it never equalled the systematic consideration of market power).
[634] As remarked above, the capability to produce effects is not the same as anti-competitive effects, precisely because market power is not considered.

object being based on the risk of anti-competitive effects. Even before *Expedia*, authors acknowledged that there was some difficulty in conciliating an assessment of market power and the Court's case law that precludes the consideration of effects.[635] The solution proposed by Bailey of 'a limited exception for agreements that would otherwise be prohibited', nevertheless, provides just the sort of presumption rebuttable by effects rejected by the Court in *T-Mobile*.[636]

This exemplifies the conundrum in which the claim that restrictions by object are based on the risk of anti-competitive effects inevitably finds itself: considering any such risk equals assessing the likelihood of effects, which is precluded by the *Consten and Grundig* case law. Rightly so, because the likelihood of effects is already covered under restrictions by effect, and this would indeed undermine the distinction between the two. As the Court stated in *Deere*:

> '[Article 101(1)] does not restrict [the assessment of restrictions by effect] to actual effects alone; it must also take account of the agreement's potential effects on competition'.[637]

By excluding the consideration of market power, the tools with which restrictions by object are left are incapable of anticipating a high risk of such effects or preventing situations of low or absent risk. This is the reason why an 'effects-based approach' accepts presumptions of anti-competitive effects based on a typology of agreements, even though it prefers not to employ rules and those presumptions are not supported by the case law: the absence of market power is in any event able to rebut such presumptions. By denying rebuttable presumptions, AG Kokott locks restrictions by object to a risk of anti-competitive effects based on factors which are not indicative of such risk. As discussed in Chapter I (on the concept of intent), rather than risk offences, restrictions by object are similar to inchoate offences. Bailey does not distinguish between the two, since they both dispense with effects.[638] Nonetheless, while risk offences involve the likelihood of harm, inchoate offences involve intent which is implemented. As will be detailed next in relation to the case law, restrictions by object

[635] See Bailey (2012) 590.
[636] Bailey (2012) 590-591, explaining the General Court case law which, anticipating *Expedia*, dismissed a *de minimis* defence as: 'the restrictive nature of the cartel activity in those cases was such that the potential effects on competition of the conduct were inherently likely to be significant'. However, no conduct is 'inherently likely to be significant' without considering market power.
[637] Case C-7/95 P *Deere* [1998] ECR I-03111 77. The Commission also makes this point explicitly, basing its assessment of restrictions by effect on this likelihood, see Guidelines on Article 101(3) 24.
[638] See Bailey (2012) 563.

do not depend on an assessment of risk, but on whether they are actually 'injurious to the proper functioning of normal competition'.

3. Moral judgments in the case law

This section will compare different explanations for the case law on restriction by object. The moral judgment argued will be confronted with the effects-based explanations prevalent in the doctrine, notably 'commercial ancillarity' and presumed efficiencies. As outlined above, intent which falls within the scope of EU competition law principles must still be judged based on its context. Hence, any such intent might ultimately be found not be restrictive. This applies to a typology of agreements identified in the 'object box'. In other words, the same intent 'to fix prices' or 'to impose an export ban' might in some cases lead to a restriction by object, and in others not, according to context. These 'hard cases' provide the best way to test the different notions of restrictions by object. If the view held by the present research is correct, these will reflect different moral judgments. An 'effects-based approach', on the other hand, will take from context the likelihood of anti-competitive effects. Thus, different explanations have been offered in the doctrine of the how a restriction by object would be prevented by showing the likelihood of some positive effect or by dispelling the likelihood of anti-competitive effects.

In the first of these explanations, Whish and Bailey argue that 'commercial ancillarity' might prevent a restriction being found when such restriction is 'necessary to enable the parties to an agreement to achieve a legitimate commercial purpose'.[639] It should be noted that Whish and Bailey place commercial ancillarity under the heading of restrictions by effect, even though the judgments referred concerned restrictions by object.[640] This appears to be due to such judgments dismissing the application of Article 101 in its entirety, excluding both restrictions by object and effect. In the same manner, *Wouters* is framed as 'regulatory ancillarity' insofar as the restriction 'was ancillary to a regulatory function'.[641] As described above, the Court did not qualify the restriction at issue in *Wouters*. Therefore, it appears that Whish and Bailey consider that context can

[639] Whish and Bailey (2012) 129-130.
[640] For example *Nungesser*, *Coditel II*, *Erauw-Jacquery* and *Gøttrup-Klim*, discussed below.
[641] Whish and Bailey (2012) 131-134.

only be considered as a full-fledge justification applying to any restriction, but not influencing the normal application of restrictions by object.

The second explanation, by Ibáñez Colomo, is closer to the present research by maintaining that context always plays a role in restrictions by object, even if not immediately apparent. Ibáñez Colomo admits that the Courts of the EU have not always applied economic theory, but argues that economic concepts can nevertheless help to understand the case law insofar as they have been applied intuitively.[642] Ibáñez Colomo thus holds that a restriction by object will be found 'only to the extent that, and in those instances where, [a restraint] is not a plausible source of efficiency gains'.[643] Therefore, Ibáñez Colomo is also of the opinion that economic context is used to assess effects, namely efficiency gains from tackling market failures.[644] The case law examined next would therefore reflect the attempts by the parties to agreements to address those market failures. Ibáñez Colomo concludes that the gains which prevent the finding of a restriction by object on those occasions require some balancing with anti-competitive effects, but that such gains 'are not expressly quantified, but merely presumed'.[645]

Besides these two explanations formulated expressly to justify why restrictions by object are not found on some occasions, such occasions can also be explained under the 'effects-based approach' discussed above as a balancing of effects which leads to the rebuttal of a presumption or the absence of risk of anti-competitive effects. Before all these explanations are assessed in relation to the case law, some considerations should be made about the effects on which they depend. It is well known that in *Metrópole* the General Court stated that pro-competitive effects should be considered under Article 101(3), not under the notion of restriction.[646] The Court has stated similarly in *Consten and Grundig* that 'no possible favourable effects of the agreement in other respects, can in any way lead, in the face of [the restriction found], to a different solution under [Article 101(1)]'.[647] These pronouncements, however, require as much confirmation as

[642] Ibáñez Colomo (2012) 542.
[643] Ibáñez Colomo (2012) 549, rejecting a presumption of negative effects or a typology of agreements, so that 'the crucial factor is not that the agreement can be presumed to deteriorate the conditions of competition on the relevant market(s), but the fact that it cannot be expected to improve them'.
[644] Ibáñez Colomo (2012) 560-561 argues that such efficiency gains could include those resulting from public policy considerations, as *Wouters* would exemplify.
[645] Ibáñez Colomo (2012) 559.
[646] See Jones and Sufrin (2014) 201 and Whish and Bailey (2012) 136.
[647] *Consten and Grundig* (fn. 85) ECR 343. See also Case 161/84 *Pronuptia* [1986] ECR 353 24, where the Court stated that investment considered below under 'commercial ancillarity' should be assessed under Article 101(3).

the statements in the case law that intent is not a necessary factor in finding a restriction by object – which turned out not to correspond to the best interpretation.

It will nonetheless be argued that the case law cannot be explained by an 'effects-based approach'. To a certain extent, the discussion on what effects are being favoured or censured by the case law under Article 101(1) will always prove unsatisfactory. As noted above, such effects are incorporated in the moral judgment of the intent to achieve or prevent them, which allows the Court to treat reasoning lightly. These represent 'economic' intuitions, as Ibáñez Colomo holds, since the moral judgment applies to competitive behaviour. However, they are not better explained by economics since they depart from an effects-based analysis. If behaviour was truly being judged on its effects, as it is under Article 101(3), the parties would as stated by the General Court be required, with good reason, to 'demonstrate that those conditions are satisfied, by means of convincing arguments and evidence'.[648] The same applies to any other area where the normative value of effects has been recognised, such as restrictions by effect or the Merger Regulation. Hence, effects preventing the finding of a restriction by object should be balanced under the 'structured framework' of Article 101(3), as Jones and Sufrin comment, not the 'amorphous framework of Article 101(1)'.[649] As will be seen next, the Court does engage in a balancing exercise in relation to restrictions by object, but based on the moral judgment of intent. Such judgment, contrary to an 'effects-based approach', is bound to remain 'amorphous'.

This section will start by examining the intent to prevent parallel trade and the context which explains *Consten and Grundig*, *Erauw-Jacquery* and *Premier League* (i). Then it will address the intent to influence the intent over competitive parameters, first directly by comparing *Gøttrup-Klim* and *Allianz Hungária* (ii), and then indirectly by doing the same with *T-Mobile* and *Asnef-Equifax* (iii). A table of the case law examined so far will also be provided (iv).

[648] GC *Glaxo* (fn. 535) 235, upheld on appeal.
[649] See Jones and Sufrin (2014) 249.

i. Intent to prevent parallel trade in *Consten and Grundig*, *Erauw-Jacquery* and *Premier League*

As commented above, the intent to prevent parallel trade is as a (deontological) rule considered offensive to the principle of market integration. In the wake of *Consten and Grundig*, rare are the instances where it has not led to the finding of a restriction. Nonetheless, that was the case of *Erauw-Jacquery*, where the Court found that:

> 'a person who has made considerable efforts to develop varieties of basic seed which may be the subject-matter of plant breeders' rights must be allowed to protect himself against any improper handling of those varieties of seed. To that end, the breeder must be entitled to restrict propagation to the growers which he has selected as licensees. To that extent, the provision prohibiting the licensee from selling and exporting basic seed falls outside the prohibition contained in [Article 101(1)]'. [650]

Various explanations of *Erauw-Jacquery* have been offered relying on the intellectual property protecting the seeds. Under commercial ancillarity, the restriction was necessary to 'protect the right of the licensor to select his licensees'.[651] In terms of efficiencies, 'the financial effort deployed by the licensor to develop a new technology' stated by the Court would lead to a presumption that the intellectual property led to a 'net positive impact on competition'.[652] Nonetheless, these explanations would not have prevented the opposite result reached in *Consten and Grundig*. That judgment also involved intellectual property, a national trademark used, like in *Erauw-Jacquery*, to prevent parallel imports. However, the Court opposed such use of the trademark.[653] Moreover, *Consten and Grundig* also involved a significant investment in the trademark, as argued by the parties and AG Roemer to no avail.[654]

Therefore, it is difficult to reconcile *Erauw-Jacquery* with commercial ancillarity. It is not clear why the right of the licensor to select his licensees is a legitimate commercial purpose in *Erauw-Jacquery* but the intellectual property itself can be set aside in other instances. What constitutes a legitimate commercial purpose appears susceptible to *ex post* rationalisations, while purposes which appear legitimate (trademark protection in *Consten and Grundig* or research and development in *Glaxo*) cannot be anticipated. In fact, *Erauw-Jacquery* is surprising as it is the only purpose admitted so far in relation to

[650] Case 27/87 *Erauw-Jacquery* [1988] ECR 1919 10.
[651] Whish and Bailey (2012) 129.
[652] Ibáñez Colomo (2012) 556.
[653] *Consten and Grundig* (fn. 85) ECR 345-346.
[654] See Jones and Sufrin (2014) 207-208.

the intent to prevent parallel trade. Even when a purpose has been found to be legitimate, there is no guarantee that ancillary restrictions will be admitted. Although an exclusive national broadcasting licence was considered legal in *Coditel II*, the Court found in *Premier League* that such legality did not extend to 'the additional obligations designed to ensure compliance with the territorial limitations upon exploitation of those licences'.[655] Thus, the prohibition to supply satellite decoders outside the territory of the licence was found to be restrictive, despite the obvious ancillarity to a legitimate broadcasting right.

An efficiency explanation of *Erauw-Jacquery* is equally problematic in comparison with *Consten and Grundig*. If the Court had followed the parties' argument in the latter – still economically valid and accepted under US antitrust – that restrictions of intra-brand competition might improve the (more important) inter-brand competition, its concern with efficiency would still be praised today. Instead, the Court was not shy of admitting that no 'net positive impact on competition' (in the words of Ibáñez Colomo) would prevent the finding of a restriction:

> 'Although competition between producers is generally more noticeable than between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of [Article 101(1)] merely because it might increase the former'.[656]

Market integration might involve a sacrifice of efficiency. If investment protected by intellectual property should prevail, there is no reason why it did not in *Consten and Grundig*.[657] In the same manner, the investment in broadcasting rights in *Premier League* is left unprotected.[658]

In comparison with these explanations, making a moral judgment of intent according to context presents several advantages. To begin with, reasoning in terms of principles will show that only an important contextual consideration will trump market integration. It is submitted that this is the only valid explanation for *Erauw-Jacquery* being such a rare instance where the intent to prevent parallel imports did not lead to a restriction.[659] This could never result from efficiency or legitimate commercial purposes, since other

[655] Cases C-403 and 429/08 *Premier League* [2011] ECR I-09083 141.
[656] *Consten and Grundig* (fn. 85) ECR 342.
[657] Ibáñez Colomo (2012) 553 also proposes a distinction based on the good incorporating the intellectual property, but this in unrelated with investment or efficiency.
[658] Ibáñez Colomo (2012) 556 argues that in *Premier League* the prohibition to supply the decoders was disproportionate, but its effects would be minimal compared with the full application of the export ban in *Erauw-Jacquery*.
[659] As described above, *Javico* did not involve the intent to restrict parallel imports.

investments or legitimate purposes should have been found by now. The moral explanation is that damage to property is judged differently from harm to investment. *Erauw-Jacquery*, the 'improper handling' of seed could alter its genetic characteristics and affect its commercial value.[660] The reference by the Court to the significant investment would ensure that the damage was not negligible.[661] Hence, it was morally admissible for the licensor to safeguard the integrity of its intellectual property. Considering that the full application of Article 101 was dismissed, and not just a restriction by object, this appears to be a non-formalised objective justification. A parallel can be made with the objective justification for a refusal to supply intellectual property under Article 102.[662]

ii. Direct influence of intent on competitive parameters in *Gøttrup-Klim* and *Allianz Hungária*

The importance of context for moral judgments becomes particularly clear when the same direct influence of intent on competitive parameters, connected in Chapter III (on collusion) to agreements, leads to different findings of a restriction. That is the case if one compares the purchasing cooperative in *Gøttrup-Klim* with a buyer-side cartel. As described above, both involve the intent to fix (purchasing) prices.[663] Significantly for the comparison of their context, both *Gøttrup-Klim* and a buyer-side cartel show a similar strategy of preventing individual members from being pressured into undercutting the others. As the Court describes in *Gøttrup-Klim*:

> 'The compatibility of the statutes of such an association with the [EU] rules on competition cannot be assessed in the abstract. It will depend on the particular clauses in the statutes and the economic conditions prevailing on the markets concerned.
>
> In a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their

[660] *Erauw-Jacquery* (fn. 650) 10. A similar concern can be seen in *Pronuptia* (fn. 647) 16 with destroying the value of know-how if it were freely transmitted. Naturally, the situations in these judgments are also both efficient and a legitimate commercial purpose, the problem being, as remarked, that such explanations are wider than the exceptions admitted by the Court.
[661] See *Erauw-Jacquery* 10 (fn. 650), citing Case 258/78 *Nungesser* [1982] ECR 2015.
[662] See Case C-418/01 *IMS* [2004] I-05039 51. This justification originates from the 'essential facility' doctrine, whereby access to infrastructure can also be denied if it leads to damage to the structure.
[663] See Ibáñez Colomo (2012) 547.

membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition'.[664]

The question put to the Court did not concern the legality of the purchasing cooperation, but the prohibition of dual membership in its statutes. The Court concluded, explicitly taking the context into account, that such prohibition did not 'go beyond what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers'.[665] Implicitly, however, the Court admitted that the purchasing cooperative did not infringe Article 101(1). If one considers this issue, the reference in *Gøttrup-Klim* to the cooperative's merits is unconvincing when transplanted to other agreements. In many markets the price depends on the volume of orders, but this gives no leave to cartelize them. The crucial point appears to be that the cooperative is facing 'the contractual power of large producers'. Nonetheless, countervailing market power is not a defence under Article 101(1) – if it were, producers would freely cartelize when supplying to large distributors, and collusive tendering would be admitted in the face of the unquestionable monopsony of the State.

The doctrinal explanations of *Gøttrup-Klim* are equally unconvincing. A supposed efficiency would be presumed from the fact that 'restraints examined could be convincingly explained by factors other than the desire to gain market power and extract rents from suppliers'.[666] However, the cooperative intended precisely to gain market power and take back the producers' margin. There is no indication whatsoever that such margin would be passed on to consumers instead of pocketed by the cooperative, which would be essential for presuming any efficiency or balancing effects. It must be remembered that the cooperative would have to prove such consumer pass-on if it were claiming an exemption under Article 101(3), or if a group of small undertakings were merging for the same purpose. As for commercial ancillarity, it is simply assumed that a purchasing cooperative is a legitimate commercial activity.[667] This again raises the issue of why some activities are legitimate while others are not.

It is argued that the moral reason why no restriction was found in *Gøttrup-Klim* was that purchasing cooperatives are legal under Danish law, and this led the Court to consider that the prohibition of dual membership would also be. This is close to commercial ancillarity, but provides a stronger underlying reasoning. Both a restriction by object

[664] Case C-250/92 *Gøttrup-Klim* [1994] ECR I-05641 31-32.
[665] *Gøttrup-Klim* (fn. 664) 40.
[666] Ibáñez Colomo (2012) 551.
[667] See Whish and Bailey (2012) 129 and Jones and Sufrin (2014) 244.

and effect were dismissed in *Gøttrup-Klim*, indicating an objective justification. Under the principle of independence of economic action not all economic actors are expected to compete in the same manner. Thus, the main difference in context between *Gøttrup-Klim* and a cartel facing seller-side market power is simply the cooperative structure. Danish law advanced the view, which the Court accepted, that purchasing cooperatives act as an adequate institutional arrangement to counter market power – or, to put it more simply, that such cooperatives are virtuous. This was a moral judgment, and does not lead to any valid presumption of efficiency or positive balancing of effects.

The principle of independence of economic action, therefore, is influenced by national law. This might raise some eyebrows, considering that the notion of restriction by object is an EU law concept. EU law trumps national perceptions, as demonstrated by the rejection of nation-wide crisis solutions in *BIDS* and *Coop de France*. Nonetheless, those were private arrangements. When assessing 'the proper functioning of normal competition', EU law may turn to national law. Indeed, the Court did so even more expressly in *Allianz Hungária*. Examining vertical arrangements between insurance providers and dealers, the Court stated that there would be a restriction by object:

> 'where, as is claimed by the Hungarian Government, domestic law requires that dealers acting as intermediaries or insurance brokers must be independent from the insurance companies. That government claims, in that regard, that those dealers do not act on behalf of an insurer, but on behalf of the policyholder and it is their job to offer the policyholder the insurance which is the most suitable for him amongst the offers of various insurance companies. It is for the referring court to determine whether, in those circumstances and in light of the expectations of those policyholders, the proper functioning of the car insurance market is likely to be significantly disrupted by the agreements at issue in the main proceedings'.[668]

As stated in Chapter III (on collusion), vertical relationships are viewed more favourably under the principle of independence of economic action, since contacts within the relationship are not considered as collusion. In *Allianz Hungária* the Court adjusted this favourable view to the national law context providing (or not) for the dealer to be independent and to act in the interest of the policy holder. It is clear that these are moral duties, and that they prove decisive for finding a restriction by object. Moreover, it should be noted that national law acts not to exclude the application of Article 101(1) as a whole, like in *Gøttrup-Klim*, but only for the definition of restrictions by object. This confirms that context is considered simply for finding a restriction by object, as argued here, and not as justification directed at anti-competitive

[668] *Allianz Hungária* (fn. 103) 47.

effects, as Whish and Bailey assume by framing commercial ancillarity under restrictions by effect. The reference to the 'the proper functioning of the car insurance market' echoes the case law definition of restriction by object, and its moral character is disassociated from any verifiable claim of efficiency or positive effects.

Allianz Hungária is also interesting for another reason: it provides an instance (as far as the present research could tell, the only one) where the Court expressly linked a restriction by object with the risk of anti-competitive effects, understood properly with reference to market power.[669] In the several restrictive scenarios posed by the Court, the following also appears:

> 'Furthermore, those agreements would also amount to a restriction of competition by object in the event that the referring court found that it is likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements. In order to determine the likelihood of such a result, that court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned'.[670]

Were it not for the reference to restrictions by object, this passage would read like guidance on restrictions by effect. This would be in line with the 'effects-based approach' of Odudu, which despite arguing for a 'presumption' states that 'account must be taken of the effects which are the necessary consequence'.[671] *Allianz Hungária* illustrates how, as held in the previous section, the distinction between restrictions by object and effect would cease to matter if both depended on the likelihood of effects. The contradiction of *Allianz Hungária* with the case law since *Consten and Grundig* has not passed unnoticed in the doctrine, with Nagy commenting that '[t]he notion that a comprehensive assessment has to be made in order to ascertain whether the agreement is (or qualifies as) anti-competitive by object […] is both conceptually flawed and dangerous'.[672] It remains to be seen whether this contradiction will be recognised by the Court so that, as Nagy suggests, this precedent 'will remain utmost limited'.[673]

[669] Which is presented very much in subsidiary in *Allianz Hungária*. The Court first focuses on the intent to partition the market, which would extend to the vertical agreements to implement it. The same would happen if there was price harmonisation at the level of the association. Only if there was no horizontal connection would the vertical agreements need to be examined, leading to both the moral judgment on 'the proper functioning of the car insurance market' and the risk-based approach described.
[670] *Allianz Hungária* (fn. 103) 48.
[671] Odudu (2009) 17, quoting the parties' arguments in *BIDS* (not accepted by the Court).
[672] Nagy (2013) 562-563.
[673] Nagy (2013) 564.

iii. Indirect influence of intent on competitive parameters in *T-Mobile* and *Asnef-Equifax*

As discussed in Chapter III (on collusion), the influence of intent on competitive parameters can also be indirect, namely through the disclosure of information constituting a concerted practice. Thus, in *T-Mobile* the Court found that the exchange of information by telecom companies about the rates paid to their dealers constituted a restriction by object. Starting with an enunciation of the principle of independence of economic action 'according to which each economic operator must determine independently the policy which he intends to adopt on the common market' in order to find a concerted practice, the Court seemingly transitions to the finding of a restriction by object:

> 'At paragraphs 88 et seq. of [*Deere*], the Court therefore held that on a highly concentrated oligopolistic market, such as the market in the main proceedings, the exchange of information was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders.
>
> It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted'.[674]

The link between the collusion and the restriction in *T-Mobile* illustrates the 'pre-substantive' analysis referred to in Chapter III (on collusion). This involves a consideration of context, as seen by the reference to oligopolistic markets, and is also directed to a moral judgment: the issue is whether the exchange of information leads to conditions 'which do not correspond to the normal conditions of the market in question'. Such a statement must be read in conjunction with 'the proper functioning of normal competition' referred in the definition of restrictions by object.[675]

A horizontal exchange of information might appear to be 'obviously' anti-competitive, since it naturally leads to the alignment of behaviour between competitors, so that an 'effects-based approach' would presume it restrictive. Regardless of such alignment, the Court will nevertheless consider whether an exchange of information may be part of

[674] *T-Mobile* (fn. 73) 32-35, citing numerous judgments including *Suiker* and *Deere*.
[675] See *T-Mobile* (fn. 73) 29.

normal or desirable market conditions.[676] That is precisely what happened in *Asnef-Equifax*. At issue were also horizontal contacts, but this time between credit institutions.[677] The purpose was to create a register with information about potential borrowers and 'the way in which they have previously honoured their debts', namely outstanding credit balance, default and collateral.[678] The Court found that:

> 'Such registers, which […] exist in numerous countries, increase the amount of information available to credit institutions on potential borrowers, reducing the disparity between creditor and debtor as regards the holding of information, thus making it easier for the lender to foresee the likelihood of repayment. In doing so, such registers are in principle capable of reducing the rate of borrower default and thus of improving the functioning of the supply of credit.
>
> As registers such as that in issue in the main proceedings do not thus have, by their very nature, the object of restricting or distorting competition within the common market within the meaning of [Article 101(1)]'.[679]

It may seem that, despite information being exchanged in *Asnef-Equifax*, the competitive harm is not the same as in *T-Mobile*. Nonetheless, it is submitted that the risk of borrower default is as much a cost of doing business in *Asnef-Equifax* as are dealer commissions in *T-Mobile*. In both cases there is collusion to prevent customers (borrowers or dealers) from moving to competitors which provide better terms. As such, in both there is a dispute over a margin, which will either benefit the sellers (credit institutions and telecom companies) or the buyers (borrowers and dealers).[680] The intent in *Asnef-Equifax* and *T-Mobile* is thus the same: for the parties to the collusion to align their offer. Yet, in *T-Mobile* the Court choses to leave those terms to the market, preserving a 'degree of uncertainty', while in *Asnef-Equifax* that uncertainty is eliminated so that credit institutions operate in full coordinated fashion.

In that regard, it is also possible to suggest efficiency explanations for *Asnef-Equifax*. The Court mentions a 'disparity between creditor and debtor as regards the holding of information', so Ibáñez Colomo argues it accepted correcting an information

---

[676] As discussed in Chapter III (on collusion), the Court therefore considered public announcements as not constituted a concerted practice in *Wood Pulp*.

[677] This was framed under an agreement, dispensing with the need to find a concerted practice. As described in Chapter III (on collusion), agreements to exchange information sit midway with concerted practices, exemplifying why a precise characterization is dispensed by the Court.

[678] See *Asnef-Equifax* (fn. 496) 46.

[679] *Asnef-Equifax* (fn. 496) 47-48.

[680] This is the same dispute for a margin that existed in *Gøttrup-Klim*. In both situations different sides are allowed to collude to the express detriment of their counterparty. In *Asnef-Equifax*, it is the supply-side credit institutions which can make borrowing harder, since risky borrowers are not allowed to 'shop around'. In *Gøttrup-Klim*, it is the buying by demand-side cooperative which is made easier, as the affiliation to single cooperative is allowed in order to strengthen its bargaining position.

asymmetry.[681] However, exchanges of information usually take place precisely because of such disparity. In public tendering, for example, the State has all the information about competing offers without tenderers being allowed to 'correct' such asymmetry. Therefore, correcting an information asymmetry cannot lead, by itself, to presumed efficiencies. In fact, financial services are the typical example for such asymmetry, but in the opposite sense of *Asnef-Equifax*: as Ibáñez Colomo comments, 'banks know more about the details and implications of the contracts they conclude with end-users'.[682] It must be observed that no effort is made in *Asnef-Equifax* to balance overall effects; it might be that it succeeds in eliminating the only area where lenders still had an information advantage. The stronger claim of efficiency, however, would lie in the supply of credit. As the Court described:

> 'if, owing to a lack of information on the risk of borrower default, financial institutions are unable to distinguish those borrowers who are more likely to default, the risk thereby borne by such institutions will necessarily be increased and they will tend to factor it in when calculating the cost of credit for all borrowers, including those less likely to default, who will then have to bear a higher cost than they would if the institutions were in a position to evaluate the probability of repayment more precisely. In principle, registers such as that mentioned above are capable of reducing such a tendency'.[683]

However, a close reading shows that, like information asymmetry, efficiency arguments appear more as reasoning justifications than deciding factors. When examining the existence of a restriction by effect, the Court states that it was accepted that the market was fragmented.[684] With no market power, it should be assumed that credit institutions would behave competitively: they cannot pass the risk to all borrowers by increasing the cost of credit, since the first one to do so will be undercut by the others. That is the very reason for credit institutions wanting to exchange information. As such, there is no reason not to let market uncertainty work and make each credit institution incorporate the risk of borrower default. In *T-Mobile*, where the market was admittedly oligopolistic, there was no argument that the internalization of dealer margins would make telecom operators increase the price of their services to regular consumers.

Moreover, there is no balancing between the supposed increase in credit and the reduction from risky borrowers no longer being served. While the latter is certain, since some borrowers will inevitably be priced out of a harmonised market despite being

[681] *Asnef-Equifax* (fn. 496) 47 and Ibáñez Colomo (2012) 557.
[682] Ibáñez Colomo (2012) 544.
[683] *Asnef-Equifax* (fn. 496) 55.
[684] See *Asnef-Equifax* (fn. 496) 58.

solvent, the former is not. The problem is the same as with *Gøttrup-Klim*: there is no indication that the margin gained will be passed on to consumers and not pocketed by credit institutions as rents.[685] The Court admits as much, since it requires a greater availability of credit and any other benefits to be demonstrated in order for an exemption under Article 101(3) to be granted, as part of the condition that a fair share of the advantage is passed on to the consumer.[686] Since this involves a reversal of the burden of proof, it is argued that it cannot be held that an efficient increase in credit is presumed to dismiss a restriction by object and, at the same time, demanded for an exemption to be granted. The only logical conclusion is that the restriction by object is unconnected to any presumed efficient outcome.

The reasons why *Asnef-Equifax* was decided differently from *T-Mobile* have little to do with a balance of effects, but are again related to moral judgment on what is 'injurious to the proper functioning of normal competition' referred in the definition of restriction by object. Like the 'the proper functioning of the car insurance market' in *Allianz Hungária*, the concern in *Asnef-Equifax* is with 'improving the functioning of the supply of credit'. The risk of default is not seen as a margin contested between credit institutions and borrowers, but something which is morally undesirable in itself. The breaking of promises is the quintessential moral dilemma.[687] The Court's misgivings about the overall supply of credit, its lack of hesitation in turning a competitive market into a collusive one, and even the unusual anti-consumer stance all appear to have been influenced by the strong moral justification of avoiding defaulting on promises. The Court again turns to national law for support, as in *Allianz Hungária*, stating that 'such registers […] exist in numerous countries'.[688] This goes to the core of the definition of restriction by object, not to a justification applicable to any type of restriction.

[685] It could be said, under *Gøttrup-Klim*, that borrowers could organise themselves in a purchasing cooperative in order to obtain better credit conditions despite their rating.
[686] See *Asnef-Equifax* (fn. 496) 67.
[687] See Dworkin (2011) 303-311.
[688] *Asnef-Equifax* (fn. 496) 47.

4. Case law table

<table>
<tr><th colspan="5">Restrictions by object as moral judgments</th></tr>
<tr><td>‘by their very nature’</td><td colspan="4">‘injurious to the proper functioning of normal competition’</td></tr>
<tr><td rowspan="2">Intent
(agreement’s provisions and objectives)</td><td colspan="4">Context</td></tr>
<tr><td>Implicit</td><td>Accepted as dismissing a restriction</td><td>Rejected for dismissing a restriction</td><td>Justification
(also applies to restrictions by effect)</td></tr>
<tr><td><u>Prevent parallel imports</u>
(Principle of market integration)
No intent:
STM
Javico</td><td>Compagnie Royale Asturienne des Mines
(national borders)</td><td></td><td>Consten and Grundig
(trademark)
Coop de France
(sector crisis)
Glaxo
(pharmaceutical sector)
Premier League
(ancillary to broadcasting)</td><td>Erauw-Jacquery
(seed integrity)</td></tr>
<tr><td><u>Influence competitive parameters</u>
(Principle of independence of economic action)
No intent:
No collusion</td><td>T-Mobile
(competitive relationship)</td><td>Asnef-Equifax
(supply of credit)
Allianz Hungária
(dealer status)</td><td>BIDS
(sector crisis)</td><td>Gøttrup-Klim
(cooperative structure)
Wouters
(deontological concerns)
Meca-Medina
(sporting concerns)</td></tr>
<tr><td><u>Direct harm to competitors</u>
(Principle of competition on the merits)
No intent:
Delimitis</td><td>Protimonopolný
(targeted boycott)</td><td>Pierre Fabre
(selective distribution)</td><td></td><td></td></tr>
</table>

5. Conclusion

This chapter examined the role of intent in the notion of restriction by object under Article 101, where the Commission's 'modernisation' first implemented the 'effects-based approach' advanced in the doctrine. However, the Commission's stated position that restrictions by object are presumptions of the same anti-competitive effects on consumer welfare caught by restrictions by effect did not fare well. The Commission's position was initially accepted by the General Court, first by referring to the types of agreements indicated by the Commission as 'obvious restrictions of competition' which dispensed with the need to examine context in *European Night Services*, and then by holding that such presumptions could be rebutted by demonstrating the absence of effects on consumer welfare in *Glaxo*. However, the Court rejected this both the Commission and the General Court approach. Not only did it reverse *Glaxo* on the issue of consumer welfare, it went on to say in *T-Mobile* that restrictions by object do not involve a rebuttable presumption of effects. In so doing, the Court simply continued to apply the standard that it had long set for restrictions by object, according to which each agreement must be assessed on its intent (indicated as 'objectives') placed in its context. This standard came as a reaction to the Commission's pre-'modernisation' practice of finding a restriction relying solely on a typology of agreements restricting contractual freedom. The Court rightly perceived that the Commission and the General Court merely substituted one typology of agreements for another, but this time based on effects on consumer welfare, and held firm.

The lack of jurisprudential confirmation of a presumption of anti-competitive effects has not undeterred the doctrinal support for an 'effects-based approach', since its main objective – to influence the Commission decision-making – has already been accomplished. It does however make it difficult to justify an 'effects-based approach'. Authors have therefore appropriated AG Kokott's analogy with risk offences in order to hold that restrictions by object are legal presumptions based on the likelihood of anti-competitive effects. This is somewhat ironic, since the same Opinion in *T-Mobile* was instrumental in denying a rebuttable presumption, and it is evident that AG Kokott does not favour an 'effects-based approach'. The need to grasp at any justification makes an 'effects-based approach' difficult to define, as the present chapter attested: authors claim that restrictions by object are, at the same time, presumptions of effects rebuttable on context (as the Commission holds), legal presumptions which dispense with the need

to consider context (as the *European Night Services* and AG Kokott hold) and presumptions of necessary effects reached by applying the standard set by the Court (as an 'effects-based approach' favours). This has had unfortunate consequences for the stability of the Court's case law, which periodically imports from various sources references to an 'effects-based approach' which it does not follow: the 'obvious restrictions of competition' in *KME*, the 'potential to have a negative impact' in *T-Mobile*, and the test of being 'likely that, having regard to the economic context, competition on that market would be eliminated' in *Allianz Hungária*.

The position of the Court is quite simple to understand if those references are discounted: an 'effects-based approach' holds that restrictions by object require (one way or the other) the likelihood of anti-competitive effects, and the Court has stated in *Deere* that such likelihood is caught by restrictions by effect. Moreover, the Court has held since *Consten and Grundig* that restrictions by object are an alternative to restrictions by effect. That alternative disappears both restrictions are based on the normative value of effects, regardless of this normative value being hidden behind presumptions, risk or context. The only way to preserve a true alternative is to ground restrictions by object on the normative value of intent, morally judged against the principles of EU competition law. Restrictions by object are not 'likely' or 'presumed' to infringe Article 101 – they are a present and serious offence against that provision. This offence might derive from the 'pre-substantive' analysis made when collusion is found under the principle of independence of economic action, or from a fresh judgment based on the principles of market integration or competition on the merits. Such moral judgments are the reason why restrictions by object are associated with legal certainty and ease of application despite involving no presumptions: the offensive character of influencing competitive parameters, of preventing market integration and of harming competitors is clear and intuitive. Some cases might involve a more delicate contextual analysis, as the comparisons made in this chapter illustrated. Nonetheless, it was found that even in then a moral judgment provides a better explanation of the case law than effects, which lack the precise framework of restrictions by effect or Article 101(3) under which they are usually examined.

CHAPTER V

Abuse of a dominant position

The previous two chapters examined whether behaviour could be deemed anti-competitive under Article 101 based on intent. It was concluded that Article 101 is triggered when collusion is found under the principle of independence of economic action, namely when intent is unduly influenced, with restrictions by object involving a further moral judgment of such intent in its context according to the mentioned principle of independence of economic action or the principles of market integration and competition on the merits. The present chapter will complete the analysis of the substantive value of intent by examining the notion of abuse of dominance under Article 102. The case law definition of abuse as an 'objective concept' has created obstacles to recognising a substantive value to intent.[689] The Court has nonetheless long employed subjective notions such as 'the purpose to strengthen a dominant position' or 'a plan to eliminate a competitor'.[690] As discussed in Chapter II (on judging intent), the Court dispelled any doubts about the legitimacy of the use of intent by stating in *Tomra* that the strategy of the dominant undertaking had to be necessarily considered and that its intention could be relied upon to find an abuse.[691] Therefore, the case law reference to an 'objective concept' will be understood, as discussed in Chapter I (on the concept of intent), as requiring the implementation of intent when it is relied upon, namely through the capability to produce effects.

Article 102 stands apart from Article 101 by the level of controversy it attracts and the consequent disparate interpretations. As seen in Chapter IV (on restrictions of competition), there is some divergence on how to frame a limited number of judgments but overall the case law on restrictions by object is seen as promoting legal certainty. In contrast, the remark by Whish and Bailey that '[i]t is not controversial to say that Article 102 is controversial' has become established wisdom in relation to abuse of dominance.[692] The Commission has added to this state of affairs by formulating its own

[689] *Hoffman-La Roche* (fn. 109) 91. See Akman (2014) 1, Jones and Sufrin (2014) 373 and Melícias (2010) 579-580.
[690] *Hoffman-La Roche* (fn. 109) 91 and *France Télécom* (fn. 24) 109.
[691] *Tomra* (fn. 26) 19-10. In *France Télécom* (fn. 24) 95 and *Tomra* (fn. 26) 9 the parties contested the reliance by the Commission on their intention.
[692] Whish and Bailey (2012) 192.

interpretation of abuse in the Enforcement Guidance on Article 102 which, as acknowledged, diverges from that of the Court.[693] Authors now cover both the case law and the Enforcement Guidance on Article 102, providing ample pickings for turning abuse of dominance into the doctrinal battleground for the goals of EU competition law. Since that involves awarding priority to or balancing certain effects, as discussed in Chapter II (on judging intent), the use of intent has become a casualty of a generalised 'effects-based approach'.

However, an 'effects-based approach' overlooks important aspects of Article 102. As described in Chapter II (on judging intent), this approach has been opposed to that of *per se* abuses, arguably overlooking that the distinction between effects and intent is different from the distinction between rules (such as *per se* abuses) and standards.[694] As this chapter will show, any combination between the two is possible: some intent is *per se* abusive (to restrict parallel imports) but so are some effects (loss-leading margin squeezes), and there are effects-based standards (exclusionary effects) and intent-based ones (the purpose to harm a competitor). To make matters further complicated, Article 102 has a layered structure whereby standards may themselves involve rules (an exclusionary effect is presumed from the 'suction' effect of some rebates; certain below-cost prices are presumed to be intended to harm competitors). From the letter of Article 102 to the specific abuses of the case law, rules and standards are interwoven with intent and effects in a delicate pattern which the purported simplicity of an 'effects-based approach' ignores.

A consequence of the misconception of an 'effects-based approach' is that it is often stated to remedy false positives and negatives.[695] For example, Whish and Bailey mention the case law on rebates as an example of *per se* abuses, which is distinguished from an 'effects analysis' demanding that 'effects should be demonstrated'.[696] However, as discussed below, the case law on rebates clearly states that it 'has to be determined whether [the] discounts or bonuses can produce an exclusionary effect'.[697] In the Court's reasoning, effects are considered as demonstrated. Moreover, an 'effects-based approach' is by definition not averse to presumptions of effects, and the presumptions of exclusionary effects in loss-leading margin squeezes and of the absence of such

[693] See Enforcement Guidance on Article 102 2-3.
[694] See Whish and Bailey (2012) 199-201.
[695] See Bavasso (2005) 618 and Jones and Sufrin (2014) 57.
[696] Whish and Bailey (2014) 200-201.
[697] *British Airways* (fn. 261) 68.

effects in above-cost selective price cuts are generally welcomed in the doctrine.[698] Naturally, Whish and Bailey mention rebates because presumptions do not appear to be equally as warranted. Nonetheless, as discussed in Chapter II (on judging intent), over- and under-inclusion are inevitable results of the operation of rules. Some presumptions of effects are more adequate than others, but this cannot be solved by an 'effects-based approach' – only good legal technique can.

The present chapter will therefore focus on what both rules and standards can represent: either intent or effects. As observed in Chapter II (on judging intent), this is made difficult by the fact that the Court might refer to effects as part of its reasoning but not as an operative test. Notably, the purpose to exclude a competitor is often considered abusive under the reasoning that it risks leading to such exclusion. However, it is not necessary to prove such risk – only intent, regardless of the risk involved – in order to establish an abuse. Article 102 lacks the alternative between object and effects of Article 101, so theoretically an 'effects-based approach' could be applied across the board. The reality however, as the present chapter will argue, is that abuse of dominance mimics the application of Article 101. Like collusion, abuse also starts from intent which is normatively relevant according to EU competition law principles such as competition on the merits and market integration. From there, abuse is found based on censoring certain strategies, as restrictions by object, or on anti-competitive effects, like restrictions by effect. Finally, abuse may also be subject to objective justifications which cover both intent and effects. The main difference between Article 101 and Article 102 is that the case law has developed around a typology which applies rules and standards to specific abuses. In other words, specific abuses have tests for finding anti-competitive behaviour, contrary to the restrictions of competition which are always examined under an object or effects standard.

This chapter will argue that abuse of dominance can be defined as methods different from normal competition. Behaviour which does not raise concerns in relation to the principles of competition on the merits (for exclusion), proportionality (for exploitation) and market integration is considered normal competition, while behaviour which potentially offends these principles is further subject to the tests of specific abuses (**1.**). The chapter will also examine the relevance of an 'effects-based approach' under Article 102, finding that abuse cannot be defined as any behaviour which leads to certain effects, and that the importance of effects in the tests of specific abuses is

[698] See *TeliaSonera* (fn. 69) 73 and *Post Danmark* (fn. 138) 36.

currently limited by the case law (**2.**). The tests of specific abuses will then be examined separately. Exclusionary abuses will be divided into direct and indirect harm in accordance to whether the purpose is to harm competitors or gain market power. Direct harm abuses apply irrespective of the competitors' efficiency, and will be found to depend on intent (**3.**). Indirect harm abuses relate to the efficiency concerns typically connected with exclusion, and will be seen to apply both intent and effects-based tests (**4.**). Market integration abuses, such as national discrimination or preventing parallel trade, will also be found to depend wholly on intent (**5.**). Lastly, a table with the case law analysed will be presented (**6.**).

1. The notion of abuse

This section will examine the case law definition of abuse of dominance and associated concepts such as the 'special responsibility of dominant undertakings' and 'competition on the merits'. It will be discussed that these notions, dismissed as vague by the doctrine in favour of economic theory, perform the important function of determining the scope of behaviour which should be subject to the tests of specific abuses. Hence, 'normal competition' is not the behaviour which passes those tests, but the one which is considered compatible with EU competition law principles in a preliminary stage and therefore avoids them (i). In turn, methods different from normal competition might involve a judgement of intent under different principles. If intent does not correspond to the paradigm of 'competition on the merits', appears disproportionately exploitative, or raises concerns of market integration, the behaviour go on to be examined under the tests of specific abuses (ii).

i. Methods different from normal competition

The case law usually defines abuse of dominance as:

> 'an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of

> the degree of competition still existing in the market or the growth of that competition'.[699]

However, in *Post Danmark* the Grand Chamber of the Court stated that Article 102 applies 'in particular' to the conduct in this definition, also adding that the effect on competition was 'to the detriment of consumers'.[700] Moreover, the case law definition does not follow the traditional division between exclusionary and exploitative abuses. While exclusionary abuses can be said to 'hinder the maintenance of the degree of competition' on the market, exploitative abuses avoid this definition and launch straight into the corresponding references to unfair prices and discrimination in Article 102(a) and (c).[701] It is however established law that the paragraphs of Article 102 are mere examples which cannot be read as establishing conditions for abuses corresponding to such examples.[702]

The doctrine has nonetheless concentrated on the above quoted definition, since it involves aspects which can be generalised to all findings of abuse. A weakened degree of competition is one of those, corresponding to the dominant position necessary for the application of Article 102. It will be argued that the case law is right in characterising abuses as 'methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators', or in short, 'methods different from normal competition'. This proves to be the best definition of abuse: exclusionary abuses must correspond to such methods in order to be differentiated from competition on the merits, while exploitative and market integration abuses must involve disproportionate or restrictive methods which do not correspond to the normative concept of normal competition.

The quoted definition in the case law has been criticised as vague, and this criticism can also be levelled at the proposed definition as methods different from normal competition.[703] Nevertheless, 'normal competition' is also part of the definition of restrictions by object under Article 101: collusion which 'can be regarded, by their very

---

[699] *Tomra* (fn. 26) 17, citing *TeliaSonera*. This formulation appears to have substituted the more convoluted one employed in *Hoffman-La Roche*, which is mostly the same but starts by referring to the behaviour being 'such as to influence the structure of the market' and is still regularly quoted in the doctrine, see Jones and Sufrin (2014) 373 and Whish and Bailey (2012) 198.

[700] *Post Danmark* (fn. 138) 24.

[701] As will be seen below, the effect on competition stated in the definition is used as reasoning for censoring intent or as an effects-based test. For exploitative abuses, see *Duales System Deutschland* (fn. 351) 141 and *British Airways* (fn. 261) 133.

[702] For example, tying does not have to follow the conditions of Article 102(d), see Case C-333/94 P *Tetra Pak* [1996] ECR I-5951 37.

[703] For example, Whish and Bailey (2014) 198 state that 'normal' competition is 'a vague and indeterminate word', but that it can become clearer through the notion of competition on the merits.

nature, as being injurious to the proper functioning of normal competition'.[704] As observed in Chapter IV (on restrictions of competition), restrictions by object are praised for their legal certainty, since it is normatively intuitive which situations do not correspond to normal competition under EU competition law principles. Thus, despite its apparent vagueness, 'normal competition' provides a good normative criterion under Article 101. The reference to normal competition under Article 102 is even simpler, as it does not involve a normative assessment of the proper functioning of the whole market but only the action by the dominant undertaking.[705]

The case law has stated in this regard that 'a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market'.[706] Like the definition of abuse, this statement has been attributed little interpretative worth. Nazzini states that it simply prohibits dominant undertakings from engaging in behaviour which is considered abusive, and that 'nothing more can and should be read into this concept'.[707] This, it is submitted, does not pay proper attention to the legal technique employed.[708] A duty of care always has important implications, in particular by making omissions relevant and prescribing certain duties, regardless of their consequences and even to the detriment of the duty holder.[709] In other words, the Court is stating that dominant undertakings have special moral properties which condition the judgment of their behaviour.[710] Thus, as will be seen below, this special responsibility forces or prevents dominant undertakings from engaging in certain strategies in relation to competitors and consumers, even if it involves protecting inefficient competitors or customers which attack their commercial interests.

Another notion which has been connected with methods different from normal competition is 'competition on the merits'.[711] The relationship between the two concepts, namely whether they are the same, has been clarified recently. In *Post Danmark* the Court stated that:

---

[704] *Allianz Hungária* (fn. 103) 35.
[705] As seen in Chapter IV (on restrictions of competition), the proper functioning of normal competition under Article 101 has forced the Court to consider specific contexts, such as the supply of credit in the financial market in *Asnef-Equifax* or national regulation of dealers in the car insurance market in *Allianz Hungária*.
[706] *Post Danmark* (fn. 138) 23.
[707] Nazzini (2011) 175-176, further arguing the prohibition 'depends on the facts of each individual case'.
[708] Metaphorically, this is the same as saying that parental duties merely prohibit parents from engaging in behaviour towards their children which is considered illegal.
[709] Jones and Sufrin (2014) 374-375 state that this special responsibility 'imposes what is in effect a positive, or affirmative, duty on dominant [undertakings] to act in certain ways'.
[710] Lianos (2009) 24 observes that this special responsibility is unconnected to the likelihood of anti-competitive effects, otherwise all undertakings with market power would have such responsibility.
[711] See Whish and Bailey (2012) 198 and Jones and Sufrin (2014) 380.

> ‘Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation’.[712]

Thus, competition on the merits is concerned with competitors, and therefore does not apply to exploitative or market integration abuses. Hence, it is a narrower concept than the notion of methods different from normal competition which, as noted above, should be understood normatively to also encompass exploitative and market integration abuses. In any event, competition on the merits provides a very important precision in relation to exclusionary abuses. *Post Danmark* confirms that, as discussed in Chapter II (on judging intent), competition on the merits (and similar references that preceded it) is grounded on the competitive paradigm whereby market success is determined only by the attractiveness of the offer in the eyes of the consumer. This paradigm may however not correspond – and often does not – to the competition which undertakings engage in the real world. In order to understand the usefulness of the notion of competition on the merits, it is necessary to describe how the notion of abuse operates.

In this regard, a comparison between Articles 101 and 102 is informative. Under Article 101, the finding of collusion requires an analysis of intent, considering context, under the principle of independence of economic action. Once collusion has been found, the standards of restriction by object or effect operate – including, for restrictions by object, the carrying over of the ‘pre-substantive’ analysis of collusion. The only substantive rules (outside precedent) concern objective justifications, which dismiss both a restriction by object and effect if certain conditions are met. Under Article 102, abuse is defined as methods different from normal competition. These, however, are not unified under a single principle as collusion under Article 101 is, involving contributions from notion such as special responsibility, competition on the merits, or the examples in Article 102. Furthermore, several rules have been formulated as tests that apply to specific abuse and their justification. Thus, contrary to restrictions by object and effect, the Court has defined a typology of abuses.[713]

It appears that it is this typology of abuses which has prevented further doctrinal inquiry on the notion of abuse, and not the supposed inherent vagueness if notions such as

[712] *Post Danmark* (fn. 138) 22.

[713] Nazzini (2011) 107-108 differentiates between objectives, rules (not in the sense given here, but of legal norms) and tests, and defines tests in relation to their operability. However, as will be seen below, not only are principles and norms operable without tests, but tests are themselves norms. Thus, the term test is better reserved to the rules and standards which apply to specific types of abuse.

'methods different from normal competition' or 'special responsibility of a dominant undertaking'. Of all fields of law, EU lawyers should be the last to decry such judicial constructs considering that the Internal Market is covered by a handful of Treaty provisions on free movement and similar open-ended notions. There is nothing in Article 102 which requires more 'scientific' criteria than free movement or, as already seen, restrictions by object under Article 101. Nevertheless, the notion of abuse is less attractive doctrinally when there is a ready catalogue of tests of specific abuses to work with (and, in particular, to tailor to the pursuit of certain goals).

As such, the only doctrinal connection between the notion of abuse and specific abuses has been to group the latter into exclusionary and exploitative abuses.[714] This is not done by interpreting the notion of abuse (as seen above, a definition which only applies to exclusionary abuses is often cited as applying to all abuses) but, as also remarked in Chapter II (on judging intent), by applying a distinction relying on economic theory between the exclusion of competitors and extracting rents from consumers. There is a conceptual gap between the principles of the notion of abuse and the tests of specific abuses. Economics cannot fill that gap since the notions of economic exclusion and exploitation do not correspond to their case law equivalents. Whish and Bailey quote a Commission official as saying that, just as a unified theory eludes physicists, economists have yet to find a single explanation for abusive conduct.[715] It is submitted that part of the problem is asking economists in the first place.

ii. Different principles define abuse

This chapter will argue that the key to filling the gap between the notion of abuse and specific abuses relies on the same insight discussed in Chapter IV (on restrictions of competition) in relation to Article 101: abuses start from intent which is judged under EU competition law principles, but instead of one principle, Article 102 depends on several. This is why there is a limited overlap between the scope of Article 102 and economic theory, or why abuses of market integration are neither exclusionary nor exploitative. Abuse can be defined as methods different from normal competition, as already stated, by understanding 'normal competition' in the normative sense –

[714] Classifications by particular authors add internal market and retaliatory abuses which, as seen below, represent a more correct examination of the way Article 102 applies according to EU competition law principles, see Jones and Sufrin (2014) 371-372.
[715] Whish and Bailey (2012) 198.

competition which is compatible with the principles of EU competition law.[716] This is not circular reasoning, since the purpose of assessing whether a method is different from normal competition is not to arrive at a definite finding of abuse. EU competition law principles only serve to identify behaviour which raises normative concerns. Once certain intent has been identified as potentially offensive to such principles, it must still be subject to a test in order to find an abuse. That is also why specific abuses are defined in terms of intent – to offer rebates, to refuse to supply, to squeeze margins, etc. Those methods do not correspond to normal competition (more precisely, as seen below, to the paradigm to competition on the merits), but are not considered automatically abusive – only if they fail the tests of the corresponding abuses.

By understanding the notion of abuse in this manner, it is possible to solve a problem which has troubled the interpretation of Article 102: how to define 'normal' exclusion or exploitation. It is held that the goals of EU competition law, in particular consumer welfare and efficiency, do not provide a solution for determining the negative scope of Article 102, i.e. when it is not abusive for dominant undertakings to exclude competitors or possess market power. As will be seen in this chapter, abuse based on harm to competitors applies regardless of their efficiency (for example, predatory pricing will harm both as-efficient and inefficient competitors), while market power is treated differently depending on its acquisition (for example, internal development is accepted but mergers are not). The solution is that exclusion and exploitation are considered normal competition when they are compatible with EU competition law principles, which depends on their intent and not on their effects. As described in relation to restrictions by object in Chapter IV (on restrictions of competition), these normative judgments are intuitive and a source of legal certainty.

Exclusionary abuses are assessed through the principle of competition on the merits, as noted in Chapter II (on judging intent), which provides the most significant example of how the notion of (methods different from) normal competition operates.[717] Jones and Sufrin state in relation to competition on the merits that:

[716] Nazzini (2011) 171 states that 'competition is "normal" when it is rational commercial conduct consistent with the profit-maximizing strategy of a non-dominant undertaking'. However, this definition does not hold against the case law. A non-dominant undertaking may find it rational to tie a product as much as a dominant one, but the latter may still be found abusive. The key is the special responsibility of dominant undertakings - a notion which, as discussed above, Nazzini does not consider important.

[717] In relation to market integration abuses that involve an exclusionary aspect, the principle will naturally be that of market integration and not competition on the merits. The same applies in relation to exploitative abuses.

> '[w]hile it may be comparatively easy to identify conduct at the extremes of the spectrum as being competition on the merits or an exclusionary abuse, the concept does not provide a tool for objectively drawing a line between 'good' and 'bad' conduct in the middle'.[718]

The function of competition on the merits is not to draw the stated 'line in the middle' – that is for the tests of specific abuses. As quoted from Gerber in Chapter II (on judging intent), competition on the merits merely indicates potential distortion of competition.[719] Therefore, it is not an operational test of abuse, but of normative relevance. This is not immediately apparent from the case law, which often mentions competition on the merits at the end of the analysis of exclusionary abuses. It is true that a failed test of abuse ultimately corresponds to an infringement of this principle, since the test is normatively connected to the notion of abuse. However, competition on the merits does not operate like collusion, in the sense that it involves a 'pre-substantive' analysis which carries over to the finding of abuse. It only signals behaviour which corresponds to its paradigm – to compete on an offer judged by consumers – and that therefore will not be subject to any test of abuse.[720] As will be seen below, all exclusionary abuses are methods which deviate from this paradigm. In *Tomra* the Court stated that this does not correspond to assessing whether the dominant undertaking has 'an intention to compete on the merits', since beliefs on the legality of the behaviour are irrelevant, as discussed in Chapter I (on the concept of intent).[721] All that is necessary is to compare the dominant undertaking's strategy, as also required in *Tomra*, with the paradigm of competition on the merits.[722]

In relation to exploitative abuses, as also remarked in Chapter II (on judging intent), it is submitted that the principle of proportionality serves the function of determining normal competition. Under economic theory, any price above the perfectly competitive level will be considered exploitative, since it involves a transfer of consumer surplus to the producer(s). Most of the doctrine defines exploitative abuses according to such economic theory.[723] Nevertheless, it is submitted that this cannot correspond to the notion of exploitation under Article 102, since a dominant position is defined by acting independently from market forces, which includes the ability to price above the

[718] Jones and Sufrin (2014) 380.
[719] See Gerber (2007) 43.
[720] As Eilmansberger (2005) 172 notes, a dominant undertaking may 'demonstrate that the conduct should not be considered abusive in the first place'. Nonetheless, the fact that a certain situation has intuitively raised competition concerns usually indicates it might not correspond to competition on the merits.
[721] *Tomra* (fn. 26) 22, where the Court even doubted in whether such intention could be established.
[722] See *Tomra* (fn. 26) 19.
[723] See Jones and Sufrin (2014) 367 and Whish and Bailey (2012) 201.

competitive level.[724] If any price above the competitive level was exploitative then holding a dominant position would be considered prohibited in itself, since the dominant undertaking will normally take advantage of its ability to charge higher prices.[725] This is something which the case law has always denied.[726] In reality, the case law on exploitative abuses is rather limited. The Court has stated that it is abusive to charge prices which have 'no reasonable relationship' or are 'disproportionate' to the economic value of the good or service provided.[727] This indicates that only disproportionate exploitation will fall within the scope of Article 102, with specific tests then being applied to the unfair prices or discriminatory practices.

Therefore, the present chapter will argue that the application of Article 102 involves three steps: first, the identification of intent which potentially offends EU competition law principles; second, the application of the tests of a specific abuse, which can be intent or effects-based; third, the verification of whether an objective justification applies. The rest of this chapter will focus on the second step, namely how far the tests of specific abuses rely on intent, while referencing the conditions which led the test to be applied in the first step. For those purposes, exclusionary abuses will be divided into direct and indirect harm abuses, representing strategies that are at odds with competition on the merits in different ways: the first by targeting competitors, the second by aiming to strengthen market power. This corresponds to the application of the 'double effect doctrine' described in Chapter II (on judging intent). The intent to cause direct harm is caught by the first strategies, not by the second. Strategies to strengthen market power can also be caught of their own right, but in relation to indirect competitor harm these strategies should be judged according to tests of effects. Exploitative abuses will not be discussed in detail since, after being selected based on the proportionality of the intent, they appear to apply effects-based tests.[728] Abuses of market integration will be examined last, as they also to apply an intent-based test.

Objective justifications will not be covered in detail since, as also seen in Chapter IV (on restrictions of competition) in relation to Article 101, they apply to both intent and effects.[729] An objective justification is constituted by a legitimate purpose and a test to

[724] See Jones and Sufrin (2014) 298-300.
[725] Indeed, the existence of supra competitive prices is a usual caution in market definition through the so-called 'cellophane fallacy', see Whish and Bailey (2012) 32-33.
[726] See *Post Danmark* (fn. 138) 21.
[727] *United Brands* (fn. 16) 250 and *Duales System Deutschland* (fn. 351) 141.
[728] Notably, effects on consumer welfare of excessive prices or on the competitiveness of discriminated partners, see *United Brands* (fn. 16) 252-254 and *British Airways* (fn. 261) 144-145.
[729] Thus, as mentioned in Chapter IV (on restrictions of competition), the Court did not qualify whether there was a restriction by object or effect in *Wouters*, mentioning elements from both types of restriction.

ensure that effects do not go beyond that legitimate purpose. Objective justifications can apply to several abuses or already be integrated in the test of a specific abuse: for example, efficiencies have been admitted as objective justifications for abusive rebates and margin squeezes, while the test of refusal to supply includes as one of its conditions the absence of an objective justification.[730] It may however happen that Court also examines as 'objective justifications' the arguments that a strategy should not be censored under an intent-based standard, or the attempts to rebut a presumption of anti-competitive intent. For example, in *France Télécom* the Court spoke of 'economic justifications other than the elimination of a competitor'.[731] These are not true objective justifications, since they do not include the control of effects, and therefore will be examined below as part of their respective intent-based tests.

2. The meaning of an 'effects-based approach'

This section will consider the importance of effects under Article 102, without which it is impossible to consider the role of intent. As already noted, and in contrast to Article 101(1), there is no separation between object and effects in abuse. Hence, there is no theoretical impediment for abuse to be wholly based on effects, as an 'effects-based approach' appears to suggest. Two issues will be analysed in relation to exclusionary abuses, the main focus of an 'effects-based approach'. The first is whether the notion of abuse as 'methods different from normal competition' can be replaced with an effects-based standard, whereby abuse would correspond to any behaviour liable to lead to an anti-competitive effect (i). The second is the standard of effects required by effects-based tests of abuse: the mere capability to produce effects, similarly to restrictions by object, or the likelihood of anti-competitive effects, as also demanded in restrictions by effect (ii). This will require a brief evaluation of the implications for intent, which also requires the capability to produce effects for implementation, of the current case law which presents both standards of effects in alternative (iii).

[730] See *British Airways* (fn. 261) 69, *TeliaSonera* (fn. 69) 76 and *IMS* (fn. 662) 37.
[731] *France Télécom* (fn. 24) 111.

i. A full 'effects-based approach'

An 'effects-based approach' usually centres on the doctrine criticising the application of tests of abuse which do not include anti-competitive effects. Thus, Whish and Bailey applaud recent Commission decisions that analyse effects (even though the Commission admits it is not legally obliged to do so).[732] There is however another way to look at an 'effects-based approach': all that would be necessary for an exclusionary abuse would be anti-competitive effects. There would be no different tests, nor even different types of abuse: the only test would be whether the behaviour resulted in exclusionary effects.[733] This single test might demand effects connected to a particular goal of EU competition law, in particular the protection of consumer welfare, or simply effects, leaving the balancing goals for another stage.[734] If this full 'effects-based approach' was adopted, the notion of abuse would not be based on intent judged according to different principles as submitted in this chapter. In other words, 'methods different from normal competition' would be irrelevant, as only outcomes would matter.

However, paradoxical as it might seem in light of the discussion over 'modernisation' and the adoption of the Enforcement Guidance on Article 102, it will be argued that an 'effects-based approach' was already implemented by *Continental Can* in 1973. In *Continental Can*, the Court considered that a merger was abusive insofar as it strengthened a dominant position 'in such a way that the degree of dominance reached substantially fetters competition'.[735] This is the definition of abuse employed by the case law, excluding the reference to 'methods different from normal competition'.[736] Indeed, the Court does not consider mergers as contrary to normal competition.[737] Rather, it declares that the methods used are irrelevant, since 'the strengthening of the position of an undertaking may be an abuse and prohibited under [Article 102], regardless of the means and procedure by which it is achieved, if it has the effects mentioned'.[738] One could not put an 'effects-based approach' more succinctly.

---

[732] See Whish and Bailey (2012) 200-201.
[733] See Lianos (2009) 22.
[734] Nazzini (2011) 52-56 details the search for a single test for exclusionary abuses, concluding that multiple tests are preferable.
[735] *Continental Can* (fn. 145) 26.
[736] It is interesting to note that the definition of abuse as an 'objective concept' in *Hoffman-La Roche*, as discussed below, concerned the causality between the dominant position and the abuse and fault, issues already examined in *Continental Can* (fn. 145) 27 and 29.
[737] Coherently with an 'effects-based approach', the Court states that Article 102 merely provides examples of abusive behaviour, see *Continental Can* (fn. 145) 26.
[738] *Continental Can* (fn. 145) 27.

Today, *Continental Can* is remembered for establishing that Article 102 is not limited to harm to consumers, but also includes practices that are 'detrimental to them through their impact on the competitive structure'.[739] Such practices are framed as exclusionary abuses, whereby the structure of the market is affected by the exclusion of competitors. This interpretation perverts the original meaning of *Continental Can*. The Court was not particularly concerned with the exclusion of competitors, skipping the examination of its market consequences, and focused squarely on the dominant undertaking. It must be remembered that the Commission decision argued that 'even so called "internal" measures […] fulfil the conditions for abuse and are thus prohibited'.[740] The issue was the expansion of the dominant undertaking, not the market consequences of excluding a competitor. Thus, when the parties argued that the scope of Article 102 was limited to actions with market consequences, the Court replied that 'any structural measure may influence market conditions, if it increases the size and economic power of the undertaking'.[741] As such, the 'structural measure' referred by the Court concerned the internal structure of the dominant undertaking, not the competitive structure of the market which it only indirectly affected.

Continental Can therefore opened the door for any action by the dominant undertaking which had the effect of strengthening its dominant position to be caught by Article 102. *Continental Can* was followed by the Merger Regulation, which regulated that particular action. Mergers, as a reorganisation of the undertaking, do not reflect a substantive concern: the only such concern relates to the market power. The concentration defined in the Merger Regulation is thus the kind of 'jurisdictional' concept which, as discussed above, an 'effects-based approach' argues for: capturing effects but without any meaning in itself. It must be highlighted that *Continental Can* applied to an increase in market power 'regardless of the means and the procedure'. As such, it outlined a 'jurisdictional' concept even wider than the concentrations object of the Merger Regulation.

There are many ways by which 'the size and economic power of the undertaking' can be increased, notably the investment in own productive infrastructure or its acquisition in the market – assets, labour, intellectual property etc. – instead of its transfer from competitors. Applying this logic, the General Court considered in *Tetra Pak* that the acquisition of an exclusive licence was abusive due to strengthening a dominant

[739] *Continental Can* (fn. 145) 26.
[740] *Continental Can* (fn. 145) ECR 228.
[741] *Continental Can* (fn. 145) 21.

position, despite not involving a merger.[742] Ultimately, because *Continental Can* does not distinguish between 'methods different from normal competition' and those which are not, any factor which leads to an increase in market power could be brought under Article 102 – including the success of the dominant undertaking. It is however apparent that subsequent case law departed from *Continental Can*. As the Court summarised in *Post Danmark*, the case law 'in no way [prevents] an undertaking from acquiring, on its own merits, the dominant position on a market'.[743]

As such, the current case law on Article 102 concentrates on the 'means and procedure' considered irrelevant in *Continental Can*.[744] This has the curious effect of mergers joining the catalogue of methods different from normal competition, when the purpose of *Continental Can* was precisely to avoid such categorisation.[745] Compared with the other forms of exclusionary abuse discussed in this chapter, it is not apparent that mergers should be given normative importance under the principle of competition on the merits. It is submitted that in *Continental Can* the Court was not so much concerned with exclusion, as currently understood, but with the goal of market integration. The Court dedicates the majority of its reasoning to the interplay between the Treaty's competition provisions.[746] Thus, its main concern appears to be that:

> '[i]f, in order to avoid the prohibitions in [Article 101], it sufficed to establish such close connections between the undertakings that they escaped the prohibition of [Article 101], then, in contradiction with the principles of the [internal market], the partitioning of a substantial part of this market would be allowed'.[747]

Considering how exceptional the full 'effects-based approach' of *Continental Can* is, it is better understood primarily as an application of the goal of market integration. Parent-subsidiary relationships were viewed favourably in *Consten and Grundig*, despite the effects they might have on market integration, by being exempt from the restriction by object described in Chapter IV (on restrictions of competition). It is argued that this has elicited a limited reaction at the level of Article 102, bringing mergers within its scope because of possible market partitioning effects. Nonetheless, those effects can still be achieved if an undertaking expands organically, based on

[742] See Case T-51/89 *Tetra Pak* [1990] ECR II-309.
[743] *Post Danmark* (fn. 138) 21.
[744] If the case law had followed *Continental Can* it would have continued to fine tune the analysis of the effects of strengthening dominance – in essence, what has happened under the application of the Merger Regulation.
[745] See Whish and Bailey (2012) 712.
[746] See *Continental Can* (fn. 145) 23-25, where market integration is examined, in comparison 26-27, which cover structural concerns much more briefly.
[747] *Continental Can* (fn. 145) 25.

market success and without engaging into any acquisition. Market partitioning can only be avoided if *Continental Can* was applied, as originally intended, to any internal measure by a dominant undertaking.[748]

Despite being motivated by the goal of market integration, *Continental Can* opened the way to regulating the full extent of the market power through the Merger Regulation. A similar expansive application could result from the Enforcement Guidance on Article 102. The Commission follows an 'effects-based approach' by stating that it will apply Article 102 to any exclusionary conduct by dominant undertakings which results 'in a position to profitably increase prices to the detriment of consumers'.[749] However, by referring to 'foreclosing competitors in an anti-competitive way', and subsequently to 'anti-competitive foreclosure' instead of mere foreclosure, the Commission indicates that it will consider the character of the behaviour and not merely whether it leads to effects on market structure.[750] The question therefore is to what extent the Commission will follow the typology of abuses developed by the Court. The Enforcement Guidance on Article 102 indicates that it will mix a general analysis with 'specific factors' pertaining to the types of abuse identified in the case law, to which considerable attention is devoted.[751] It is nevertheless natural that the Commission will continue to extend the application of Article 102 to new types of abuse. It remains to be seen whether they will develop from the principles which orientate the current typology, as held here, or whether it will apply *Continental Can*'s full 'effects-based approach' to behaviour which might appear normatively neutral.

ii. A limited 'effects-based approach'

An 'effects based approach' is not usually employed in the full sense of *Continental Can* examined above, but in the limited sense of incorporating effects in the tests of all specific abuses. This is limited insofar as the notion of abuse derives from EU

[748] It is not excluded that the Court might resurrect the *Continental Can* doctrine if it wishes to further empower the Commission's competence to regulate certain situations, in particular the parallel behaviour in oligopoly discussed in Chapter III (on collusion).
[749] Enforcement Guidance on Article 102 19.
[750] Enforcement Guidance on Article 102 19-20. An 'exclusionary strategy' is featured among the factors mentioned in relation to anti-competitive foreclosure, but the remaining factors concern market power issues which might lead to any type of foreclosure (anti-competitive or not).
[751] Enforcement Guidance on Article 102 21.

competition law principles, as methods different from normal competition, and not straight from effects. Lianos comments that:

> 'The calls for an 'effects-based' economic approach do not question the need to classify or create categories of abuses. Do they imply, however, the adoption of a unified analytical framework for [Article 102] that could apply to all commercial practices? At an abstract level, this may be the case […]. At a more practical level, though, an effects-based approach will not preclude classification'.[752]

Therefore, a limited 'effects-based approach' is not generally seen as a handicap by its advocates. As described above, such approach is usually connected with avoiding false positives of anti-competitive effects. Even with abuse being defined as methods different from normal competition, if anti-competitive effects were always demanded as part of the tests of specific abuses those false positives would be limited. Hence, for the remainder of the chapter an 'effects-based approach' will be referred to in this limited sense. The question is whether the case law follows this approach.

As already stated, Article 102 does not distinguish between object and effects so that, in theory, abuse could always require effects in the same way as restrictions by effect do. The reverse however is also true: all abuses could be structured around intent, as restrictions by object are. It was also noted above that specific abuses have developed around a typology with their own tests, while restrictions by object have not. This must not obfuscate the choice in the interpretation of Article 102 between intent and effects, for which restrictions by object and effect still provide useful reference points. The absence of a formal separation between intent and effects in the case law can cause some confusion, as the description of a single type of abuse can alternate between intending a certain effect and causing it. For example, as discussed below, rebates can be found abusive by both intending exclusivity and leading to effects akin to exclusivity. In other situations, it is hard to locate the operative test of an abuse, as intent might be used subordinate to effects or effects used as mere reasoning for intent. All this emphasises the need to properly frame abuses as intent or effects-based.

Both the analysis of intent and an 'effects-based approach' are however made harder by the case law of the General Court which assimilates object and effect. The General Court stated in *France Télécom* that:

> 'As regards the conditions for the application of [Article 102] and the distinction between the object and effect of the abuse, it should be pointed out that, for the purposes of applying that article, showing an anti-competitive object and an anti-

[752] Lianos (2009) 36, focusing however on the categorisation as specific abuses rather than the concept of abuse as methods different from normal competition.

> competitive effect may, in some cases, be one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect'.[753]

It is argued that the assimilation of object and effect is profoundly misguided. Under Article 101, the Court has gone to great lengths to differentiate object and effect. As described in Chapter IV (on restrictions of competition), it has consistently precluded any consideration of the anti-competitive effects of restrictions by object, since this would erode the distinction with restriction by effect. Thus, in *T-Mobile* the Court rejected a rebuttable presumption of anti-competitive effects, and in *Expedia* it rejected submitting restrictions by object to a *de minimis* requirement of market power. It defies comprehension why the General Court would transpose the object and effect dichotomy to Article 102 in order to express the exact opposite meaning: where it has always signified difference, now it is supposed to signify 'one and the same thing'. No clue is given of the reasons for this change.[754] The case law cited by the General Court, namely that predatory pricing under *Akzo I* did not require actual anti-competitive effects, does not allow extracting that predatory pricing is 'liable to have such effect'.[755] The same happens in relation to the assertion, citing *Compagnie Maritime Belge*, that it is no defence that an abusive practice might turn out to be harmless.[756] *Akzo I* and *Compagnie Maritime Belge* represent abuses where intent is used, as in restrictions by object, regardless of the liability to produce anti-competitive effects.

However, despite the Court avoiding the adoption of the 'object and effect' dichotomy under Article 102, the same result will be achieved if abuse is understood as only requiring the capability to produce effects. As described in Chapter IV (on restrictions of competition), the Court stated in *T-Mobile* that a restriction by object must be capable of having an effect on an individual case.[757] This effect corresponds to the implementation of the agreement, since otherwise mere intentions (not translated into action) could be considered restrictive. The difference with a restriction by effect producing anti-competitive effects is market power. A restriction by object may be implemented (in, at least, an individual case) and produce its effects despite the absence

[753] Case T-340/03 *France Télécom* [2007] ECR II-107 195, repeating Case T-203/01 *Michelin* [2003] ECR II-4071 241.
[754] It is possible that the General Court is stating that under Article 101 restrictions by object are liable to lead to anti-competitive effects, and therefore the same applies under Article 102. This would however represent an additional misreading, this time of Article 101.
[755] GC *France Télécom* (fn. 753) 195. As discussed below, predatory pricing is only liable to lead to anti-competitive effects in very limited situations. It is the intent to engage in such prices which is considered abusive.
[756] GC *France Télécom* (fn. 753) 196, also repeating GC *Michelin* (fn. 753) 242.
[757] See *T-Mobile* (fn. 73) 31.

of market power. Such absence, however, will prevent anti-competitive effects from being produced. Restrictions by effect, in contrast, require market power or else risk being considered *de minimis*. As seen in Chapter I (on the concept of intent), insofar as abuse is an 'objective concept' it also must be capable of producing effects as part of its implementation.

The question, therefore, is whether the notion of abuse requires the likelihood of anti-competitive effects when applying effects-based tests, as an 'effects-based approach' argues for. The General Court, as the logical continuation of its misguided effort to assimilate object and effect, has also considered that the capability to produce effects is the same as likelihood of anti-competitive effects. For example, in *Clearstream* it stated in relation to the abuse of refusal to supply that:

> '[w]ith regard to the condition of elimination of all competition, it is not necessary, in order to establish an infringement of [Article 102], to demonstrate that all competition on the market would be eliminated, but what matters is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market'.[758]

Whether the refusal 'is liable' to eliminate all competition corresponds to the capability to produce such effects, and is not the same as their likelihood. As Nazzini comments, this is true for English and 'in a number of the languages of the EU'.[759] The General Court effectively lowers the threshold of effects by assimilating both concepts. This goes against the case law of the Court quoted by the General Court, namely *Bronner*, which expressly states the refusal must 'be likely to eliminate all competition'.[760] The General Court's thus appears to use its own notion of abuse, based on the liability of effects which, as remarked above, it considers 'one and the same thing' as establishing an anti-competitive object.[761] This means that, despite nominally requiring effects, the General Court nullifies an 'effects-based approach' by adopting the same conditions as restrictions by object.

Without having directly reviewed the notion of abuse advanced by the General Court, the Court has nonetheless accepted that Article 102 only requires the capability to

[758] Case T-301/04 *Clearstream* [2009] ECR II-3155 148, citing Case T-201/04 *Microsoft* [2007] ECR II-3601. However, GC *Clearstream* constitutes an evolution from *Microsoft*, where the General Court analysed the risk of eliminating all competition. As mentioned in Chapter IV (on restrictions of competition), risk should require the likelihood of anti-competitive effects in order to be meaningful.
[759] See Nazzini (2011) 296.
[760] Case C-7/97 *Bronner* [1998] ECR I-7791 41, quoted in GC *Clearstream* (fn. 758) 147. In *IMS* (fn. 662) 37 the Court also mentioned that the refusal must be likely to exclude all competition.
[761] It should be repeated that the General Court does so with reference to judgments, such as *Akzo I* and Cases C-395-396/96 P *Compagnie Maritime Belge* [2000] ECR I-1365, which dispense this likelihood.

produce effects. Reviewing the General Court's judgment in *British Airways*, the Court states that an abuse will depend on whether 'the discount tends [i.a.] to bar competitors from access to the market'.[762] The use of the expression 'tends' would appear to indicate that the Court refers to the likelihood of effects. Nonetheless, in the following paragraph the Court states that it must be determined if the discounts 'produce an exclusionary effect, that is to say whether they are capable [inter alia] of making market entry very difficult or impossible for competitors'.[763] More recently, the Court has framed the capability to produce effects as an alternative to the likelihood of doing so. In another judgment on rebates, the Court declared in *Tomra* that:

> '[t]he General Court was correct to observe […] that, for the purposes of proving an abuse of a dominant position within the meaning of Article 102, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect'.[764]

The Court further stated that it was 'unnecessary to undertake an analysis of the actual effects of the rebates on competition' since demonstrating the capability to produce effects was enough.[765] Despite not assimilating the capability to produce effects with their likelihood, as the General Court has done, the Court effectively lowers the threshold of effects to the less demanding of the alternative presented. There is no need to demonstrate the likelihood of effects if the mere capability to produce them is enough. Moreover, the way the above quote from *Tomra* is framed – without an express reference to rebates – indicates that the standard of capability to produce effects might be applicable to abuses in general.

Even before *Tomra*, authors had already remarked that the case law was unfavourable to an 'effects-based approach'. The capability to produce effects, as restrictions by object indicate, is inherent to the implementation of a practice and (save exceptional circumstances) is not checked for when considering such practice as anti-competitive. Gormsen distinguishes between demonstrating anti-competitive effects (based on the economic and legal context) and merely requiring the capability to produce them (based on the practice).[766] The two would be in opposition, since the latter would involve a presumption of effects:

---

[762] *British Airways* (fn. 261) 67.
[763] *British Airways* (fn. 261) 68.
[764] *Tomra* (fn. 26) 68.
[765] *Tomra* (fn. 26) 79.
[766] See Gormsen (2013) 225.

> 'Where effects are accepted as true, regardless of evidence of lack of effects, the assumption of effects is irrebuttable. […] The only way that dominant undertakings can defend themselves is by challenging the basic fact that they did not engage in the conduct'.[767]

In fact, what is surprising is that the advocates of an 'effects-based approach' have not focused more on this issue. It is apparently assumed that a move away from *per se* abuses is enough for requiring the demonstration of anti-competitive effects, without considering that one presumption might be substituted by another. Thus, Whish and Bailey quote *TeliaSonera* as authority for such a move by stating that 'the practice must have an anti-competitive effect on the market'.[768] However, despite the Court describing situations where such effects are likely, like in *Tomra* the Court also safeguards that it is sufficient that 'the practice may be capable of having anti-competitive effects'.[769] The abuse of margin squeeze at issue in *TeliaSonera* is defined as a spread between upstream and downstream which does not allow as-efficient competitors to contest the market, with that effect further defined as 'reduced profitability'.[770] It is apparent that the capability to produce such effect is inherent in the definition of abuse, establishing an effective presumption. The focus of the Court's analysis of effects is on objective justification, with the only viable alternative form dispelling an abuse being to demonstrate that it 'is not in any way economically justified'.[771]

iii. The capability to produce effects

Whatever can be said about the presumption derived from the capability to produce effects, it is apparent that the Court genuinely believes that it adequately captures anti-competitive effects. In other words, the Court has been convinced that anti-competitive effects will follow, within an acceptable degree of false positives and negatives, the rebates and margin squeeze defined in *Tomra* and *TeliaSonera*. Thus, despite Gormsen's characterisation above holding, there is no conceptual contradiction between demanding effects and presuming them. In Chapter IV (on restrictions of competition) it was rejected that restrictions by object are based on the risk of anti-competitive effects,

[767] Gormsen (2013) 232. This is under the assumption that abuses always aim to capture effects, either evaluating or presuming them, and that there are no intent-based abuses, see Gormsen (2013) 228.
[768] See Whish and Bailey (2012) 201, quoting *TeliaSonera* (fn. 69) 64.
[769] *TeliaSonera* (fn. 69) 69-74.
[770] See *TeliaSonera* (fn. 69) 32 and 74.
[771] *TeliaSonera* (fn. 69) 75-77.

since they do not take market power into account; under Article 102, where a dominant position presupposes market power, it is perhaps legitimate for the Court to consider that the capability to produce effects already implies the risk of anti-competitive effects.

It is argued that the existence of a dominant position provides the foundation for the case law equating the capability to produce effects with the likelihood of anti-competitive effects. When asked in *TeliaSonera* about the importance of the degree of market power, the Court tellingly dismissed it in favour of the simple existence of a dominant position.[772] If effects were ever in doubt, market power would be paramount in determining them, as it happens in relation to restrictions by effect under Article 101. However, as remarked above, effects are already presupposed in the definition of margin squeeze. Thus, the Court stated in *TeliaSonera* that 'market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists'.[773]

Naturally, it is not for the present research to examine whether effects are properly captured under Article 102, but this has direct consequences for the role of intent. Despite the Court's confidence in its methods, the doctrine does not appear to agree that the case law properly represents the likelihood of anti-competitive effects. Thus, as discussed in Chapter II (on judging intent), the case law is often accused of being formalist under an 'effects-based approach', to the point where it is wrongly associated with intent despite the Court's repeated references to effects. This can only contribute to the prevailing lack of attention to the legal techniques employed. Nonetheless, both the Court's methods and the doctrine's readings are likely to continue since, as Whish and Bailey state, 'the trend towards effects analysis under Article 102 is clearly established'.[774]

In reaction to an 'effects-based approach' or not, the Courts of the EU have strained the coherence of their case law by including more references to effects. The General Court's assimilation of object and effect, referencing intent-based abuses which dispense the need for such effects, in uncalled for. More to the point, the several references to likely effects by Court sit awkwardly with the lower threshold of the capability to produce them. For example, there is no reason for the Court to concern

[772] See *TeliaSonera* (fn. 69) 78-82.
[773] *TeliaSonera* (fn. 69) 81. This statement again parallels the case law under Article 101 on the capability to produce effects of restrictions by object, see *T-Mobile* (fn. 73) 31.
[774] Whish and Bailey (2012) 201.

itself with the likelihood of effects derived from indispensability or sales at a loss in *TeliaSonera* if the definition of margin squeeze already implies the capability for reduced profitability.[775] The case law of the Court on refusal to supply demands the likelihood of eliminating all competition, and yet the General Court chose in *Clearstream* to only demand the capability to do so, showing how the threshold of effects naturally veers towards the less demanding of two alternatives.

Nonetheless, by presenting the capability to produce effects and the likelihood of anti-competitive effects in the alternative in *Tomra*, the Court has preserved the freedom to apply the latter to effects-based abuses. This might happen in reaction to the future application of the Enforcement Guidance on Article 102, namely acting when 'the allegedly abusive conduct is likely to lead to anti-competitive foreclosure'.[776] Indeed, the risk is that the application of the Enforcement Guidance on Article 102 will end in the opposite mistake and associate the likelihood of anti-competitive effects to abuses which, as explained next, depend on intent-based tests (similarly to what the General Court has done by assimilating object and effect). The capability to produce effects remains the correct standard in relation to intent, which requires implementation in order not to capture mere intentions.[777] All that is necessary is to apply the alternative in *Tomra* correctly: such capability to intent-based abuses, and the likelihood of anti-competitive effects to effects-based ones.[778]

3. Direct harm abuses

This section will examine direct harm abuses, which start from the intent to inflict harm on competitors which is considered objectionable under the principle of competition on the merits.[779] By application of the 'double effect doctrine', direct harm abuses can be distinguished from normal competition and other exclusionary abuses, discussed below, where competitors are indirectly harmed by a strategy with the purpose to strengthen

[775] As argued below, *TeliaSonera* also includes an intent-based test, which might have contributed to the capability to produce effects being mentioned.
[776] Enforcement Guidance on Article 102 20.
[777] See Nazzini (2011) 188. As mentioned in Chapter I (on the concept of intent), the Court analysed such implementation in *AstraZeneca* (fn. 109) 102.
[778] As will be seen below, *Tomra* also mixes intent and effects-based abuses, which might have been in the origin of the Court's decision to subject all to the mere capability to produce effects.
[779] The expression 'harm' is used instead of 'exclusion' in order to highlight that the intent does not have to be to exclude the competitor from the market, or prevent him from gaining market power, but to simply harm it (within the bounds of the market action covered by EU competition law). When referring to the case law, 'exclusion' will be employed insofar as that is the term used by the Court.

market power. Direct harm is a method different from normal competition because it deviates from the principle of competition on the merits. As noted above, competition on the merits is grounded on a paradigm: undertakings competing on 'price, choice, quality or innovation' leading to the exclusion of those 'that are less efficient and so less attractive to consumers'.[780] Thus, the intent to harm competitors, rather than relying on such harm to emerge naturally from competition, will in principle deviate from this paradigm and warrant further investigation under Article 102. Several specific direct harm abuses have arisen out of these situations. The tests of these abuses, as described below and in contrast with indirect harm, depend solely on intent and not on effects.

Despite the abundant case law confirming so, the fact that the intent to harm competitors can be considered abusive has caused much doctrinal anxiety. It is argued by some authors that it is 'impossible to distinguish the intention to restrict competition from the intention to compete vigorously'.[781] As often remarked in US antitrust but applicable everywhere, competition breeds dislike between competitors.[782] This leads to the concern that, by considering the intent harm to competitors abusive, one would be protecting them instead of protecting competition.[783] It is submitted that these issues are connected, but not in the way the doctrine has understood them. If intent is correctly interpreted and its legal consequences well applied, it is possible to distinguish the intent to harm competitors and that of competing for the market.

First, it must be determined whether the harm is intended as an end in itself, or as a consequence of an increase in market power. This is a typical application of 'double-effect' discussed in Chapter II (on judging intent), and constitutes the difference between direct and indirect harm. When undertakings compete vigorously, they are attempting to gain market power. Harming competitors in that case is usually an inevitable consequence, as one undertaking's gains are another's losses.[784] This contrasts with a strategy that has as its purpose to directly harm competitors.[785] Whether such harm results in strengthening market power might also have been envisaged by the dominant undertaking, but this is irrelevant. What is relevant is whether the harm is

[780] *Post Danmark* (fn. 138) 22.
[781] Akman (2014) 3.
[782] See Bavasso (2005) 618.
[783] See Whish and Bailey (2012) 195-197.
[784] There are several scenarios where competition does not mean rivalry, such as demand absorbing all production, but they would also involve considering strategic gains (investment in future capacity, reputation, etc.). In any event, the presence of rivalry does not have to be settled conclusively, as undertakings in the same relevant market are assumed to be competing.
[785] As discussed in Chapter I (on the concept of intent), in order for behaviour to be interpreted as intent to harm it must be based on a credible plan to do so. The mere motivation to harm without such a plan is not sufficient to find intent.

seen as an indirect consequence or as the purpose of the behaviour. In essence, harm to competitors may be prohibited if pursued directly.[786]

Second, the intent to inflict direct harm is checked under the principle of competition on the merits. As already stated, the paradigm of undertakings competing on an offer judged by consumers is incompatible with strategies that directly harm competitors – indeed, competition on the merits is mostly a device to allow indirect harm. Nonetheless, the intent to harm competitors may still be considered normal competition when it is necessary or ancillary to a choice on the merits. This corresponds to a consideration of the economic and legal context similar to a restriction by object which departs from intent potentially offensive to Article 101. Thus, the enforcement of intellectual property, even if having the purpose to prevent its use by competitors and thereby harm them, will be considered part of normal competition.[787] However, not all uses of intellectual property correspond the paradigm of competition on the merits, in which case it will (as normal) be considered abusive if it is intended to harm competitors, as discussed below in relation to *AstraZeneca*.

Third, if direct harm is considered contrary to competition on the merits it must, as normal, be further analysed under the tests of specific abuses. As will be seen below, direct harm is mostly judged according to a standard which considers context. Therefore, different factors are considered depending on the circumstances. A particular competitor being targeted by the dominant undertaking is usually indicative of abuse, notably in refusals to supply customers, selective price-cutting or so-called 'naked abuses'.[788] Another factor indicative of abuse is the misuse of a legitimate exclusionary instrument in order to harm, such as legalised cartels and intellectual property. Finally, the case law can also institute rules whereby certain factors presume an abusive intent to harm. Thus, below-cost pricing and certain margin squeezes are considered to have no other purpose but that. The present section will therefore separate the direct harm abuses between applying a standard (i) or such rules (ii).

This all shows that direct harm abuses can distinguish between the intent to harm and vigorous competition, but also that, as some authors feared, their final result is

[786] As seen in Chapter IV (on restrictions of competition), competition on the merits can also be offended under Article 101 by similar actions such as organised boycotts: it might have the indirect effect to gain market power, but regardless its purpose is to harm the boycotted undertaking.
[787] As examined in the next section, a refusal to licence is only considered abusive if used as a method to strengthen market power and thereby cause indirect harm.
[788] Nonetheless, as seen below, the fact that competitors are discriminated against is not in itself abusive, since it does not automatically imply that there is the intent to harm, see *Post Danmark* (fn. 138) 30.

protecting competitors.[789] Nonetheless, it is argued that this does not imply a choice between competitors and competition, since Article 102 does both. Direct harm abuses safeguard competitors from harmful action directed at them, while indirect harm abuses establish the acceptable methods to gain market power. The inclusion of 'naked abuses' in the Enforcement Guidance on Article 102, for which the Commission will not assess anti-competitive foreclosure, has finally convinced some authors that competitors might be directly protected from harmful intent.[790] Jones and Sufrin state that this section of the Enforcement Guidance on Article 102 'turns away from an effects-based analysis', while Nazzini considers this as the prime example of an intent-based test of abuse.[791] Regardless of the Enforcement Guidance on Article 102, however, there are already decades of case law to the effect that direct harm to competitors is considered abusive.

i. The standard of intending to harm competitors

Direct harm abuses employ a standard which takes context into account. Like restrictions by object under Article 101, the case law can be categorised under a certain typology – refusals to supply existing customers, selective price-cutting, misleading intellectual property representations, etc. –, but there appears to be no rules associated with these abuses leading to an automatic finding of an abuse. Therefore, the judgments in *Commercial Solvents* (a), *Compagnie Maritime Belge* (b) and *AstraZeneca* (c), as well as the 'naked abuses' of the Enforcement Guidance on Article 102 (d), will be examined individually as an application of a standard. The small number of judgments dealing with the same type of abuse does not allow fully excluding the presence of rules in these judgments or to properly assess the relative value of the factors considered under the standard. The Court is satisfied with censoring the purpose to exclude competitors when appropriate, failing to expressly distinguish when that purpose is absent or not censorable. Nonetheless, the fact that it examines the same specific abuses in other judgments as indirect harm provides an indication of which factors were decisive to establish the intent to directly harm competitors.

[789] In *Post Danmark* (fn. 138) 21 and 27-29 the Court states that Article 102 does not 'seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market', but as mentioned below this must be read together with the fact that the Court expressly dismissed the intent to harm competitors. Therefore, this statement is limited to indirect harm, as the abundant case law on direct harm examined next confirms.

[790] See Enforcement Guidance on Article 102 20.

[791] See Jones and Sufrin (2014) 385 and Nazzini (2011) 188-189, the latter exemplifying with many of judgments mentioned below.

It should be underlined that direct harm is often mixed with elements from indirect harm. The Enforcement Guidance on Article 102, despite covering clear harm to competitors in 'naked abuses', still speaks of creating no efficiencies or inferring anti-competitive effects.[792] Nazzini follows this cue by stating that intent-based tests of abuse must have 'no conceivable redeeming virtue either by way of economic efficiencies or otherwise, and is reasonably capable of causing consumer harm'.[793] Nonetheless, as will be seen, these factors are not integrated in the tests of direct harm abuses. Whether protecting competitors might have efficiency and consumer welfare rationale depends on the definition of the goals of EU competition law. However, like restrictions by object under Article 101, such effects are not decisive for direct harm abuses (but, as with any abuse, can be considered under objective justifications).

a. Refusing to supply a customer in *Commercial Solvents*

Commercial Solvents is a particularly important judgment for direct harm, since it came immediately after the full 'effects-based approach' of *Continental Can* examined above. Had the Court continued following such approach, all that would have mattered for finding an abuse would have been the effect of strengthening the dominant position. Setting aside that short-lived approach, in *Commercial Solvents* the Court focuses on intent of the dominant undertaking, concluding that it 'decided to limit, if not completely to cease, the supply of [the raw material] to certain parties'.[794] This serves to establish intent to harm those parties, and to reject the alternative claim put forward by the dominant undertaking that the refusal was 'inspired by a legitimate consideration of […] expanding its production'.[795] Such intent can be said to be contrary to competition on the merits, which presupposes that the dominant undertaking can only (indirectly) harm its customer by competing on the downstream market.

The Court applies a standard to the intent to harm by stating it will be abusive if 'an undertaking which, with the object of reserving such raw material for manufacturing its

[792] See Enforcement Guidance on Article 102 20.
[793] Nazzini (2011) 393. This is changed to 'reasonably causing competitive harm' in another instance, see Nazzini (2011) 188.
[794] Cases 6 and 7/73 *Commercial Solvents* [1974] ECR 223 24.
[795] *Commercial Solvents* (fn. 794) 23.

own derivatives, refuses to supply a customer'.[796] This standard implicitly rejects that the 'desire to start manufacturing those derivatives (in competition with its former customers)' would allow the refusal.[797] The decisive factor for finding an abuse appears to be that the refusal targeted an existing customer, since the same strategy to limit supplies 'in order to facilitate its own access to the market' has been examined as indirect harm in *IMS* and other judgments on refusal to supply examined below.[798] Even if the Court mentions that the refusal 'risks eliminating all competition' in *Commercial Solvents*, it only does so as part of its reasoning and nowhere finds or requires effects. On the contrary, the Court refuses to analyse whether the competitor had enough reserves of the raw material allowing it to 'reorganize its production in good time'.[799]

b. Selective price cuts in *Compagnie Maritime Belge*

Compagnie Maritime Belge involved direct harm through selective price-cutting by the dominant undertaking. Its intent was clear, since it was 'never seriously disputed, and indeed admitted at the hearing, that the purpose of the conduct complained of was to eliminate [the competitor] from the market'.[800] The standard applied by the Court again takes into account several factors, particularly the fact that legislation allowed the sector to effectively cartelise, creating a collective dominant position covering almost all of the market which its members used to target the competitor with cross-subsidised selective prices.[801] The Court considered that, rather than expressing the matching of prices in competition by the merits, this practice 'eliminate[d] the principal, and possibly the only, means of competition open to the competing undertaking'.[802] This was unaccompanied by an analysis of effects, in particular taking into consideration that the prices practiced were still above-cost.

The finding of an abuse in *Compagnie Maritime Belge* must be understood in light of *Post Danmark*, which also involved discriminatory above-cost prices. As described in

[796] *Commercial Solvents* (fn. 794) 25. While preceding the case law definition of abuse as methods different from normal competition, the Court makes it nevertheless clear that it is extracting this judgment from the principles underlying the competition provisions in the Treaty.
[797] *Commercial Solvents* (fn. 794) 24.
[798] *Commercial Solvents* (fn. 794) 25. In *United Brands* (fn. 16) 182 the Court stated that a dominant undertaking 'cannot stop supplying a long standing customer who abides by regular commercial practice', but the refusal to supply did not concern a competitor.
[799] *Commercial Solvents* (fn. 794) 26.
[800] *Compagnie Maritime Belge* (fn. 761) 119.
[801] See *Compagnie Maritime Belge* (fn. 761) 115-119.
[802] *Compagnie Maritime Belge* (fn. 761) 117.

the next section, the Court evaluated the effects of those prices as indirect harm. This means that the difference between the tests applied to the same abuse can be wholly attributed to the intent to harm competitors, which was expressly excluded in *Post Danmark*.[803] This also showed that discrimination is not, in itself, liable to indicate the intent to harm a competitor.[804] Therefore, there is no rule whereby discriminatory or selective prices are considered automatically abusive. Nonetheless, *Compagnie Maritime Belge* demonstrates that discrimination can be evaluated under a standard. It is submitted that the difference can explained by the fact that, as discussed in Chapter I (on the concept of intent), intent can only be interpreted from a credible strategy. In *Compagnie Maritime Belge* the cartelised, 'super-dominant' position made it clear that selective pricing was intended to harm the competitor, even if above-cost, by creating a permanent handicap.[805] In *Post Danmark* it could not be established that there was such a strategy to 'deliberately […] drive out that competitor' – the Court then examining abusive indirect harm.[806]

c. Misleading representations and deregistration of intellectual property in *AstraZeneca*

AstraZeneca also involved the intent to harm competitors, which was considered abusive in two situations: when misleading representations were made to extend intellectual property rights over pharmaceutical products, and when those rights were deregistered delaying the entry on the market of generic products. Both of these abuses were considered to have the purpose of harming manufacturers of generic products, and hence against competition on the merits.[807] Nonetheless, it is submitted that the reading of the first abuse is made unnecessarily difficult by the General Court's formulations, which the Court implicitly corrects without reversing the appealed judgment. The General Court pursued an erroneous interpretation that abuse as an 'objective concept' did not allow it to rely on intent, and therefore applied a supposedly objective test:

[803] See *Post Danmark* (fn. 138) 29.
[804] See *Post Danmark* (fn. 138) 30. Price discrimination may have the sole objective of increasing the margin of the dominant undertaking, which as discussed below in relation to exploitative abuses can be considered compatible with competition on the merits.
[805] In *TeliaSonera* (fn. 69) 81 the Court mentions that 'super-dominance' was a factor in *Compagnie Maritime Belge*.
[806] *Post Danmark* (fn. 138) 29.
[807] See *AstraZeneca* (fn. 109) 93 and 130. There was also a question of preventing parallel imports, which could also give rise to an abuse of market integration. As mentioned above, several principles might be infringed in the same abusive situation.

> 'the submission to the public authorities of misleading information liable to lead them into error and therefore to make possible the grant of an exclusive right to which an undertaking is not entitled, or to which it is entitled for a shorter period, constitutes a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition. […]
>
> It follows from the objective nature of the concept of abuse […] that the misleading nature of representations made to public authorities must be assessed on the basis of objective factors and that proof of the deliberate nature of the conduct and of the bad faith of the undertaking in a dominant position is not required for the purposes of identifying an abuse of a dominant position'.[808]

The problem with the 'objectively misleading' test set by the General Court is apparent: every mistake in applying for an exclusive right – including the common situation of a pre-existing right by another undertaking – can be considered abusive. Nazzini comments that General Court was wrong in framing the test of abuse as 'purely objective', as this would lead to unduly wide findings.[809] The natural solution would be to concentrate on the misleading intent as a strategy to harm competitors. However, the General Court further stated that intention might be a relevant factor but was not necessary, relying on its case law in GC *Aéroports de Paris* that abuse 'implies no intention to cause harm'.[810] As can be seen from the analysis of direct harm so far, the General Court's position is in direct contradiction with the case law of the Court.

Nonetheless, the reference to intention playing a possible role managed to preserve GC *AstraZeneca* on appeal.[811] The Court, after quoting the ample evidence indicating misleading intent, concluded that it is not compatible with competition on the merits to 'have recourse to highly misleading representations with the aim of leading public authorities into error'.[812] This centres the test of abuse squarely on intent, disregarding the General Court's statements to the contrary. The Court then deals with the (legitimate) critiques of the scope of the abuse set by the General Court, by stating that unintended errors were 'radically different from [the dominant undertaking's] conduct'.[813] This is quite unusual, since the Court cannot conduct a factual review. It is argued that the Court does so in order to settle the issue of intent, saving the judgment under appeal by adding that the General Court had stated that the assessment of

[808] GC *AstraZeneca* (fn. 173) 355-356, citing *Hoffman-La Roche*.
[809] Nazzini (2011) 190.
[810] GC *AstraZeneca* (fn. 173) 359.
[811] This might be at the origin of the standard adopted by the General Court, mentioned above, mixing object and effect as 'the same thing'. By always affirming the presence of intent and effects, the General Court's judgments can be flexibly read by the Court.
[812] GC *AstraZeneca* (fn. 173) 98.
[813] *AstraZeneca* (fn. 109) 99.

misleading representations depended on the 'specific circumstances of the case' – including the dominant undertaking's intention. In any event, this corresponds to the standard applied to other judgments of abusive intent to harm competitors. Thus, the Court concludes that the abuse consisted in 'an overall strategy seeking to unlawfully exclude [generics manufacturers]'.[814]

The second abuse in *AstraZeneca* was also considered part of an overall strategy to harm the manufacturers of generic products, in this case through 'conduct designed, inter alia, to prevent [them] from making use of their right' to place their products on the market.[815] As described above, the dominant undertaking deregistered pharmaceutical patents in several countries in order to delay the introduction of such products. Like *Compagnie Maritime Belge*, the selective character of the practice was considered indicative of the intent to harm competitors, the Court rejecting the claim by the dominant undertaking that it merely attempted to avoid regulatory costs.[816] The Court nevertheless states that, had such intent been present, it might be considered an objective justification.[817] As noted above, the Court might frame an alternative interpretation of intent as an objective justification. It is nevertheless unclear whether this is the case in *AstraZeneca*, or if avoiding regulatory costs is a true objective justification (potentially applicable to other abuses and demanding that its effects are proportional).

AstraZeneca also presupposes that deregistration by the dominant undertaking does not constitute competition on the merits which, as set out above, allows the normal use of intellectual property (even with the intent to harm competitors).[818] The dominant undertaking thus argued that the case law recognised 'the right to exercise that right at any time without having to provide any reasons and without having to take account of the interests of manufacturers of generic products and parallel importers'.[819] The Court did not deny this, but stated that it did not concern deregistration of the right.[820] Therefore, at issue was not the normal use of intellectual property for competition on

[814] *AstraZeneca* (fn. 109) 111. Coherently with the intent-based abuse, the Court states it is irrelevant whether such strategy was completely successful.
[815] *AstraZeneca* (fn. 109) 131.
[816] See *AstraZeneca* (fn. 109) 135-138.
[817] See *AstraZeneca* (fn. 109) 135.
[818] The first abuse did not correspond to such use, since the issue was the extension of protection and not its enforcement.
[819] *AstraZeneca* (fn. 109) 125, the dominant undertaking citing Case C-172/00 *Ferring* [2002] ECR I-6891 as authority.
[820] See *AstraZeneca* (fn. 109) 130.

the merits.[821] This highlights that the 'misuse' of legitimate institutes is taken into consideration in the standard of direct harm abuse.[822] The Court indicated that the only strategy available to the dominant undertaking, if the enforcement of intellectual property is not available, was to attempt to 'minimise the erosion of its sales' – under the paradigm of competition on the merits, by providing a better offer to consumers.[823]

d. 'Naked abuses' in the Enforcement Guidance on Article 102

The application of the standard of the case law on direct harm abuses appears to have been integrated in the Enforcement Guidance on Article 102. The Commission states that it may skip the analysis of anti-competitive foreclosure (the scope of which seems to coincide with indirect harm) in 'naked abuses':

> 'If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product'.[824]

As can be seen, the examples given by the Commission correspond to situations of direct harm whereby the products of particular competitors are targeted with strategies contrary to competition on the merits. The examples are illustrative enough to understand that they represent the application of a standard of direct harm, and not individual tests of abuse. Nazzini expressly associates such 'naked abuses' with intent but, as seen above, also adheres to the Commission's explanation that this is based on the lack of efficiencies.[825] However, it is submitted that such efficiencies cannot be determined if the Commission skips the analysis of anti-competitive foreclosure.[826] Therefore, the inference of anti-competitive effects is unjustified: the behaviour might very well have positive effects if competing products are inferior or consumers would

[821] As also mentioned above, the enforcement of intellectual property in those circumstances can be considered abusive only in relation to strengthening market power.
[822] Another instance of such misuse (yet to be confirmed by the Court) is the abuse of vexatious litigation, see Case T-111/96 *ITT Promedia* [1998] ECR II-2937 72-73.
[823] See *AstraZeneca* (fn. 109) 129.
[824] Enforcement Guidance on Article 102 22. The terminology of 'naked abuses' is taken from Nazzini (2011) 188, even though, as with restrictions by object under Article 101, whether abuses are 'naked' in relation to efficiencies is only relevant for justifications.
[825] See Nazzini (2011) 188-189.
[826] As seen in Chapter IV (on restrictions of competition), similar claims that restrictions by object reflect efficiency concerns cannot be validated in the absence of a framework such as Article 101(3).

be better off by not testing or acquiring them, something which is unrelated to the behaviour, yet it does not appear that such considerations would influence the application of this part of the Enforcement Guidance on Article 102. If anything, efficiency could be considered as justification at a later stage (the Commission references indicating that this would be unlikely on the facts), but not for the finding of abuse, which appears focused on the case law standard of harm to competitors.[827]

ii. Rules on the intent to harm competitors

The intent to harm competitors can also be formalised into rules as part of the tests of specific abuses. Rules which automatically consider certain behaviour as anti-competitive, as observed above, are the main difference between the application of Articles 101 and 102. Pricing practices appear to lend themselves to such rules, as will also be seen below in relation to indirect harm. It seems that reducing the many facets of the competitive process to the single parameter of price makes it easier to establish rule-based presumptions of anti-competitive behaviour. Those presumptions can be interpreted as capturing either intent or effects. The case law examined below will show rules that presume the intent to harm competitors, making their effects irrelevant. Such rules have been formulated for predatory pricing, as seen in *France Télécom* (a) and for margin squeeze, as examined in *TeliaSonera* (b).[828]

a. Predatory pricing in *France Télécom*

The fact that predatory pricing is based on below-cost prices has led some authors to characterise the abuse in terms of anti-competitive effects, namely disciplining competitors or excluding them from the market.[829] Nevertheless, uncertainty reigns on whether those effects are actually prevented, with predatory pricing being the running example of false positives.[830] Matters have been made more confused by the above

[827] Lianos (2009) 33 admits the possibility of such justification, since it applies to all abuses.
[828] As will also be seen, only prices below average variable costs are subject to a rule in *France Télécom*, the standard examined above applying to prices below average total costs. It is also possible that rules might have been formulated in *AstraZeneca*, but further case law is required to clarify whether intent can be presumed from certain types of misleading representations or selective deregistration.
[829] See Jones and Sufrin (2014) 401-402 and Whish and Bailey (2012) 739.
[830] See Jones and Sufrin (2014) 402-403 and Whish and Bailey (2012) 740.

described assimilation of object and effect by the General Court, formulated precisely in relation to predatory pricing.[831] From this dubious foundation, the General Court assumes that the abuse of predatory pricing has two, equally important elements: 'non-recovery of costs' and 'predatory intent'.[832] Nazzini follows a similar two-step approach, with the cost test being 'unequivocally based on the as efficient competitor principle', but having to be corrected by intent since below-cost pricing 'is not always sufficient to infer that the conduct under review is likely to harm social welfare in the long term'.[833] Indeed, the general conception that results from these views is that the abuse of predatory pricing is focused on below cost-prices and their consequences.[834]

It is argued that this is a mischaracterisation of predatory pricing, which focuses on the intent to harm competitors. Below cost-prices provide a presumption of such intent, as examined next, not any inference in relation to their possible effects. Therefore, these costs values are a subordinated element without any independent value. This corresponds to the economic evidence, emphasised in US antitrust, that below-cost prices only lead to anti-competitive effects in very limited situations.[835] Those situations require a standard which can incorporate strategic considerations.[836] In contrast, rules which equate below-cost prices with effects on as-efficient competitors are inadequate, and rightly raise concerns about false positives. Below-cost pricing is often used on a temporary basis (launch of new lines, stock clearance) or even part of many industries' business model (continuous production facilities, two-sided markets, profits in aftermarkets).[837] Such rules, however, are adequate for capturing the intent to harm competitors, regardless of whether they are effectively disciplined or excluded. In *France Télécom*, the Court starts by stating that not all price competition can be considered competition on the merits, but when it characterises the abuse it does not mention below-cost prices (or their effects):

> '[i]n particular, it must be found that an undertaking abuses its dominant position where […] it operates a pricing policy the sole economic objective of which is to

[831] See GC *France Télécom* (fn. 755) 195.
[832] GC *France Télécom* (fn. 755) 197.
[833] Nazzini (2011) 202 and 222.
[834] In the wake of the Areeda-Turner test suggested for US antitrust, see Jones and Sufrin (2014) 403-404 and Whish and Bailey (2012) 740-741.
[835] The Supreme Court stated in relation to such effects that 'there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful', see Matsushita 475 US 574 (1986).
[836] See Whish and Bailey (2012) 740. To some extent, the condition of recoupment in US antitrust (a standard) attempts to capture the possibilities where predation successfully leads to such effects.
[837] See Jones and Sufrin (2014) 407.

> eliminate its competitors with a view, subsequently, to profiting from the reduction of the degree of competition still existing in the market'.[838]

As Jones and Sufrin observe, the abuse of predatory pricing is defined by the case law as 'eliminatory intent'.[839] The 'profit' from reducing competition is not reflected in the test instituted, hence it must be considered as mere reasoning for the effect intended – right or wrongly – by the dominant undertaking (which, as noted above, often happens in relation to references to effects in the case law). That intent is presumed under the case law, the Court establishing that:

> 'prices below average variable costs must be considered prima facie abusive inasmuch as, in applying such prices, an undertaking in a dominant position is presumed to pursue no other economic objective save that of eliminating competitors'.[840]

The Court then adds that such intent may also be relevant in another situation:

> 'prices below average total costs but above average variable costs are to be considered abusive only where they are fixed in the context of a plan having the purpose of eliminating a competitor'.[841]

Therefore, it can be seen that below-cost prices are not abusive because of their potential effects on as-efficient competitors, but because they are seen as credible plans to harm competitors.[842] As the Court stated in *TeliaSonera*, pricing decisions are interpreted from the point of view of the undertaking's own costs (and other knowledge incorporated in its strategy).[843] Thus, it is reasonable to establish a rule that prices below average variable cost are presumed to be intended to harm competitors, since they also harm the dominant undertaking. The dominant undertaking may rebut this presumption by presenting another explanation, what the Court refers as 'economic justifications'.[844] As for prices below average total costs, the Court admits that they can indicate the intent to harm a competitor, but demands further proof of such strategy. Therefore, in contrast with prices below average variable costs, the Court establishes no rule. The standard for intent to harm competitors stated above is applied, with prices below

[838] *France Télécom* (fn. 24) 106-107.
[839] See Jones and Sufrin (2014) 406.
[840] *France Télécom* (fn. 24) 109.
[841] *France Télécom* (fn. 24) 109.
[842] O'Donoghue and Padilla (2013) 301-302 argue, to the contrary, that the abusive character lies with the consequences of the cost values.
[843] See *TeliaSonera* (fn. 69) 41.
[844] *France Télécom* (fn. 24) 111. As mentioned above, these are not objective justifications, but alternative interpretations of intent.

average total costs being signalled as a possible relevant factor.[845] This also means that above-cost prices are not referred to because of their effects on as-efficient competitors, but simply because they do not constitute credible strategies to harm them.

Moreover, the value attributed by the Court to recoupment confirms that predatory pricing is focused on intent and not effects. In *France Télécom* the Court rejects that an abuse would require proof of 'the possibility of recoupment of losses suffered by the application, by an undertaking in a dominant position, of prices lower than a certain level of costs'.[846] Demanding such recoupment would equal instituting a rule to capture anti-competitive effects, as US antitrust does, since it requires that the dominant undertaking strengthens its market power in order to subsequently raise prices.[847] Coherently with the test of abuse, the only value of recoupment is in relation to the intent to harm competitors, namely disproving that below-cost pricing does not pursue this strategy.[848] Indeed, the possibilities of rebutting the presumption established by the Court do not coincide with the absence of recoupment. The situations referred above of below-cost pricing (promotions, business model) may lead to such recoupment in the long run without being considered predatory, since their intent is not to harm competitors directly.

Alignment of prices with competitors should also be seen in relation to the intent to harm competitors, but the particularities of the appeal of the General Court's judgment have obscured this. Jones and Sufrin claim that the right to align prices has been 'taken away' by the special responsibility of the dominant undertaking.[849] However, the Court only examined whether the General Court fulfilled the obligation to state reasons when denying the right to align prices.[850] When it came to evaluate whether this was substantially valid, the Court rejected the ground of appeal as inadmissible.[851] Technically, whether a dominant undertaking is prohibited from aligning its prices is still unconfirmed, and there is good reason to believe that the General Court decided wrongly. Like recoupment, the alignment of prices might show – in fact, it normally will show – that the intent is not to harm competitors. The problem is that competitors

[845] It is curious that the Court mentions 'competitors' in the first case and 'a competitor' in the second, perhaps indicating that targeting a particular competitor will be consistent with the intent to harm, as discussed above in relation to *Compagnie Maritime Belge*.
[846] *France Télécom* (fn. 24) 110.
[847] Nonetheless, if always demanded as part of a rule for capturing such effects, recoupment may also be prone to errors of under-inclusion.
[848] *France Télécom* (fn. 24) 111.
[849] See Jones and Sufrin (2014) 412.
[850] *France Télécom* (fn. 24) 43-48.
[851] The dominant undertaking only explained why it did have the right to align prices through arguments it had not formulated in first instance, *France Télécom* (fn. 24) 53-61.

are considered not to have the market power to drive prices below cost, and therefore the 'alignment' might result from previous strategic action by the dominant undertaking. Nonetheless, if this is not the case, and the alignment results from those competitors' market power, then it should not be considered abusive.

b. Margin squeeze in *TeliaSonera*

Margin squeeze is another abuse where the Court has formulated a rule presuming the intent to harm competitors. As already stated, in *TeliaSonera* the Court established several effects-based tests in relation to margin squeeze, which could be triggered by either the likelihood of anti-competitive effects or the mere capability to produce effects.[852] This begged the question why the Court bother to preserve the alternative (and continued to do so in *Tomra*) when one standard is much easier to satisfy than the other.[853] It was submitted that, despite the case law presuming that the capability to produce effects is enough to assume their likelihood due to the dominant position, a better reading would be to demand such likelihood for effects-based tests, as restrictions by effect (and an 'effects-based approach') do, while the capability to produce effects would still be required for the implementation of intent-based tests, like restrictions by object also require. As it happens, *TeliaSonera* also includes an intent-based test, which would validate the presence of both standards of effects under this reading (the same happening, as will be seen below, in *Tomra*).

After establishing an effects-based test in *TeliaSonera*, the Court was asked whether there also had to be a dominant position in the squeezed downstream market. As the test concerned the increase of market power in that market, the Court naturally answered that an effect was likely, regardless of a dominant position, 'because of the close links between the markets concerned'.[854] However, the Court added the following:

> 'Further, in such a situation, in the absence of any other economic and objective justification, such conduct can be explained only by the dominant undertaking's intention to prevent the development of competition in the downstream market and to strengthen its position, or even to acquire a dominant position, in that market by using means other than reliance on its own merits'.[855]

[852] See *TeliaSonera* (fn. 69) 69-74.
[853] See *Tomra* (fn. 26) 68.
[854] See *TeliaSonera* (fn. 69) 87.
[855] *TeliaSonera* (fn. 69) 88.

The reading of this passage can only be that a margin squeeze in closely linked markets will be presumed to be intended to harm competitors. It is reasonable to establish this rule since, as with predatory pricing, a margin squeeze assumes that costs are not being covered or that there is reduced profitability (which, due to the dominant position upstream, is a permanent handicap). As the Court states:

> 'A margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102'.[856]

The effects 'may' be produced because margin squeeze is, 'in itself', a credible strategy to harm competitors. Indeed, an intent-based test fits a margin squeeze being defined in relation to the costs of the dominant undertaking (or, exceptionally, to competitor costs which derive from knowable or projectable market conditions).[857] Hence, as concluded in *TeliaSonera*, the capability to produce effects would be enough to find an intent-based abuse.[858] If, on the contrary, the dominant undertaking could provide an economic and objective justification – which, as remarked above, is often an alternative interpretation of intent –, then the likelihood of anti-competitive effects would be tested under an indirect harm abuse.

4. Indirect harm abuses

This section will analyse indirect harm abuses, which start from the intent by the dominant undertaking to strengthen its market power in a manner which is objectionable under the principle of competition on the merits. These strategies might indirectly harm competitors, either as a means or consequence, but their target is the market structure. This makes them hard to distinguish from competition on the merits. The paradigm of undertakings competing on an offer judged by consumers is used by the case law precisely to illustrate that indirect harm is allowed, or as the Court stated,

[856] *TeliaSonera* (fn. 69) 31.
[857] See *TeliaSonera* (fn. 69) 41 and 44. Intent can also be interpreted in this case in subordination to effect, since it constitutes a good proxy for effects on as-efficient competitors. It is interesting to note, however, that the Court uses legal certainty to 'reinforce' that the dominant undertaking's costs should be considered, see *TeliaSonera* (fn. 69) 44. In effects-based tests such legal certainty is often disregarded, only mattering if effects are produced: for example, it may be impossible for the dominant undertaking to know if a genuinely new product will be prevented by its refusal to license.
[858] See *TeliaSonera* (fn. 69) 64.

that 'not every exclusionary effect is necessarily detrimental to competition'.[859] As such, it not the purpose to strengthen market power which is abusive, but the particular methods employed to do so. Indirect harm abuses do not correspond to competition on the merits insofar as they do not rely on consumers' choices for achieving market power. Hence, strategies of controlling distribution channels, inputs or connected markets are intended to prevent competitors from offering their products altogether or in similar conditions to the dominant undertaking. These are the concerns behind the specific abuses such as exclusivity, rebates, refusal to supply and margin squeeze.

As already seen, intent which is objectionable under competition on the merits still has to be subject to the tests of specific abuses, which in indirect harm abuses can be either intent or effects-based. Tests of intent correspond to censurable strategies to change the market structure, regardless of their effects. When applying rules, those strategies are considered unavailable to the dominant undertaking. More often, the case law applies a test of effects, in order to assess if the strategy is likely to actually affect the market structure. This accepts that competition on the merits does not cover the full range of the competitive process, and that strategies which deviate from the paradigm are usually not censurable in themselves (as long as competitors are not directly targeted). Only if these strategies lead to anti-competitive effects will they be considered abusive. This section will therefore examine the intent-based tests of exclusivity and loyalty rebates in *Hoffman-La Roche* (i), followed by the effects-based tests applied to rebates, refusal to supply, margin squeeze and selective price cuts in *British Airways* and *Tomra*, *IMS*, *TeliaSonera* and *Post Danmark*, respectively (ii).

i. Intent-based tests of indirect harm

Hoffman-La Roche established the two intent-based tests of indirect harm abuses. The first test concerns exclusivity, and states that an undertaking will abuse its dominant position if it 'ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking'.[860] The second test applies to rebates, which will be considered abusive if they are 'fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements […] from the undertaking in a

[859] *Post Danmark* (fn. 138) 22.
[860] *Hoffman-La Roche* (fn. 109) 89.

dominant position'.[861] The intent is the same in exclusivity and fidelity rebates: to condition distributors to 'obtain supplies exclusively from a particular undertaking'.[862] This is considered contrary to competition on the merits ('based on an economic transaction') because they are 'designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market' – in other words, they go against the paradigm where market success is dictated by choices unconstrained by contractual obligation of financial incentive.[863]

Not all such exclusivity or rebates are anti-competitive, hence the tests instituted by the Court. First, both tests are subject to the acquisition of 'most or all' requirements, hence limited constraints are admissible. Second, the Court distinguishes between prohibited fidelity rebates and admissible quantity rebates, the latter 'exclusively linked with the volume of purchases'.[864] Quantity rebates exemplify a strategy that does not correspond to competition on the merits (since distributors are still conditioned) but is nevertheless allowed. The strategies which are prohibited are the ones which allow the dominant undertaking to 'consolidate this position'.[865] This applies a rule whereby, once exclusivity and loyalty rebates are found, the intent to strengthen market power through methods different from normal competition is presumed. Unlike the presumptions of intent to harm competitors in predatory pricing and margin squeeze above, such presumption does not appear to be rebuttable. Hence, the Court disregards any other rational reasons for pursuing these strategies.

The Court further defined in *Hoffman-La Roche* the characteristics of prohibited strategies to strengthen market power. The Court declares that such strategies do not require the leveraging of existing market power. It was discussed above that such causality is an important part of the analysis of anti-competitive effects, as demonstrated by restrictions by effect under Article 101. Since exclusivity and fidelity rebates were considered abusive regardless of effects, it is logical that such causality is not demanded.[866] It was in this regard that the Court defined abuse as an 'objective concept'. First, intent-based abuses apply regardless of causality, limiting the role of effects to the already described proof of implementation as expressed by the capability

[861] *Hoffman-La Roche* (fn. 109) 89.
[862] *Hoffman-La Roche* (fn. 109) 90. The Court adds that rebates may also lead to discrimination between suppliers, which can be understood both as indirect harm or exploitation.
[863] *Hoffman-La Roche* (fn. 109) 90. As already mentioned above, the expression 'designed' is an indication of the underlying intent.
[864] *Hoffman-La Roche* (fn. 109) 90.
[865] *Hoffman-La Roche* (fn. 109) 90.
[866] The same way that, as seen in Chapter IV (on restrictions of competition), restrictions by object are independent of market power.

to produce effects. Second, the 'objective concept' addressed the argument that an abuse requires fault, which as noted above the Court side-steps in order to apply the values of EU competition law.[867]

ii. Effects-based tests of indirect harm

Although the present research does not cover the normative value of effects, the case law on indirect harm applying an effects-based test will be examined in order, first, to dispel the notion that some of the presumptions of effects instituted in relation to rebates are triggered by intent and, second, to differentiate the use of intent and effects tests in relation to the same type of abuse.

a. Rebates in *British Airways* and *Tomra*

The case law on indirect harm has evolved from intent towards effects-based tests. This includes the case law on rebates, where intent-based rules now coexist with effects-based rules and standards. This evolution started in *Michelin*, but it is best understood in *British Airways* since there the Court squared such evolution with *Hoffman-La Roche*. At issue in *British Airways* were retroactive target rebates considered abusive by the General Court, whereby reaching one of the several targets led to the rebate being applied to all sales made before. The Court considered that, like in *Michelin*, target rebates were:

> 'neither discounts for quantity, linked exclusively to the volume of purchases, nor fidelity discounts within the meaning of the judgment in *Hoffmann-La Roche*, since the system established by *Michelin* did not contain any obligation on the part of resellers to obtain all or a given proportion of its supplies from the dominant undertaking'.[868]

The Court therefore realises the limitations of the intent-based tests formulated in *Hoffman-La Roche* for fidelity and quantity rebates: some strategies do not have such a

[867] The dominant undertaking argued that abuse implied that the behaviour was objectionable or immoral, see *Hoffman-La Roche* (fn. 109) ECR 499.
[868] *British Airways* (fn. 261) 65.

sufficiently defined character to assess their compatibility with Article 102. Thus, the effects-based test of *Michelin* is applied, which states that:

> 'it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.[869]

This test first mentions that rebates do not correspond to competition on the merits (here referred to as 'an advantage not based on any economic service justifying it'), and then establishes several anti-competitive effects which the rebate 'tends' to cause. Intent (namely the interpretation of 'the criteria and rules governing the grant of the discount' instituted by the dominant undertaking) plays a subordinate role to assessing such effects. The Court focuses on the effects on the market structure, namely rebates that 'give rise to an exclusionary effect'.[870] This exclusionary effect can be found by establishing rules where it is legally presumed or by the application of the quoted standard.

The Court applies both a standard of anti-competitive effects and rules presuming such effects in *British Airways*. First, it establishes that individual target rebates and 'all or nothing' retroactive will be considered to give rise to an exclusionary effect.[871] This formalises the rebates found in *Michelin* into rules. Second, the Court validates the General Court's analysis under the standard of 'whether the bonus schemes at issue had a fidelity-building effect capable of producing an exclusionary effect'.[872] The reference to 'fidelity' should not lead one to conclude that *British Airways* introduces a variant of (intent-based) loyalty rebates. The Court notes that, for finding such fidelity, the General Court considered the dominant undertaking's 'much higher larger share than its competitors' and the nature of competing offers, a usual part of an effects analysis.[873]

An 'effects-based approach' might at first seem incompatible with *British Airways*, but there is no doubt that this judgment employs effects-based tests. The Court did not review the market analysis conducted by the General Court due to its factual nature, not

[869] *British Airways* (fn. 261) 67 citing *Michelin*.
[870] *British Airways* (fn. 261) 70. The Court could have instead focused on the exploitative effects of discrimination, namely the constraints on distributor's choice or their discrimination.
[871] *British Airways* (fn. 261) 71 and 73.
[872] *British Airways* (fn. 261) 77.
[873] *British Airways* (fn. 261) 75-76.

because the test was intent-based.[874] Moreover, when considering an efficiency justification, the Court makes it clear that it will balance it against the negative effects of the rebates.[875] What seems to bother authors is not that effects are not considered, but that an exclusionary effect is legally presumed.[876] However, that exclusionary effect is presumed from other effects, namely how the freedom of choice of distributors is affected by particular schemes.[877] There is no *per se* abuse, as Whish and Bailey suggest, but a relationship of causality between effects. However, the end result is very similar: any rebate scheme which is considered to pressure distributors will be considered abusive. As such, arguments in *Tomra* that not all of the market was covered by the rebate scheme or that it did not lead to price below costs proved ineffective, since they were always considered to lead to an effect on distributors.[878]

The issue is not the application of effect-based tests but, as discussed above in relation to *Tomra*, the standard that it is only necessary for the rebates to be capable of producing such effects.[879] By examining market power and competing offers, the Court is close to the as-efficient competitor considerations in effects-based tests applied in other abuses. Nonetheless, the Court's insistence on the link between the exclusion of competitors and the freedom of competitors sets the threshold of abuse quite low, since rebates appear always capable of producing effects on the latter. If this link is not sound, it should be subject to greater scrutiny by demanding the likelihood of anti-competitive effects, as the Enforcement Guidance on Article 102 apparently does.[880] This would be compatible with the *Tomra* since this judgement also dealt with a loyalty rebate, the Court stating that some of the discounts 'often applied to some of the largest customers […] with the aim of ensuring their loyalty'.[881] Therefore, as stated above, the reference to the capability to produce effects in *Tomra* could be explained by the intent-based test, reserving the likelihood of anti-competitive effects to the application of effects-based tests. As the case law stands, however, both are mixed.

[874] See Jones and Sufrin (2012) 473-475.
[875] See *British Airways* (fn. 261) 86.
[876] See Whish and Bailey (2012) 728-729.
[877] See *British Airways* (fn. 261) 73-74.
[878] See *Tomra* (fn. 26) 37-44 and 67-81.
[879] See *Tomra* (fn. 26) 79.
[880] See Enforcement Guidance on Article 102 39. However, the fact that *Tomra* was appealed and decided with the Enforcement Guidance on Article 102 already in place but without the Commission changing its defence raises legitimate doubts on its value.
[881] *Tomra* (fn. 26) 75.

b. Refusal to supply in *IMS*, margin squeeze in *TeliaSonera* and selective price cuts in *Post Danmark*

The approach to rebates contrasts with the abuses of refusal to supply, in both their varieties of physical and intellectual property.[882] When direct harm is not found, the Court has found that a refusal to supply can only be abusive in 'exceptional circumstances'.[883] Such exceptionality derives from the fact that enforcing physical or intellectual property is usually considered compatible with competition on the merits.[884] As the Court stated in *IMS*, a refusal to licence 'cannot in itself constitute an abuse of a dominant position'.[885] Therefore, the licence must be indispensable in order for its refusal to be abusive, setting up an effects-based test requiring three additional conditions.[886] The first is preventing the emergence of a new product for which there is demand. The second condition is the absence of an objective justification.[887] The third condition is the likelihood of exclusionary effects, which was argued to be the correct standard for effects-based tests. Nevertheless, it is unclear whether this last condition is due to the exceptionality of finding the refusal abusive. As observed above, the General Court did not follow such condition in *Clearstream*.[888] In any event, the role of intent is subordinate to effects.[889] Notably, preventing a new product implies that the dominant undertaking does not aim to offer such product itself, or that the requesting undertaking will not produce a mere duplicate.[890]

The abuse of margin squeeze is also subject to effects-based tests when direct harm is not found, as already observed above in relation to *TeliaSonera*. The Court quotes the standard of exclusion used in rebates, and then introduce particular effects-based tests

[882] These will be understood as being the same except for the condition of preventing appearance of a new product for which there is consumer demand, insofar as *Bronner* (fn. 840) 41-47 considered the application of the case law on intellectual property but only discussed the conditions of indispensability and likelihood of eliminating all competition.
[883] See *Bronner* (fn. 760) 39 and *IMS* (fn. 662) 35.
[884] As discussed in relation to *AstraZeneca*, even if the enforcement of intellectual property is intended to harm a competitor it will not be considered a direct harm abuse, requiring an additional element of misuse. In the same manner, it was mentioned above that the fact that the refusal affected an existing customer seems decisive for finding direct harm in *Commercial Solvents*.
[885] *IMS* (fn. 662) 34.
[886] See *IMS* (fn. 662) 38.
[887] See *IMS* (fn. 662) 51.
[888] See GC *Clearstream* (fn. 758) 148.
[889] In *IMS* the product which was refused had been adopted as an industry standard due to the involvement of its users in its creation. It thus appears that the Court could have established a direct harm if it so wished. However, the Court only considered this as another factor in relation to the indispensability of the database.
[890] *IMS* (fn. 662) 49.

for margin squeeze.[891] Margin squeeze is defined as the spread between the dominant undertaking's upstream and downstream operations not allowing an as-efficient competitor to contest the downstream market.[892] The Court institutes the rule that if the upstream price is higher than the downstream price (i.e. leading to sales at a loss) exclusion is probable.[893] If the downstream price covers the upstream price an exclusionary effect will still be possible due to 'reduced profitably'.[894] The Court sets another rule that if the wholesale input is indispensable, an anti-competitive effect will also be probable in case of reduced profitability.[895] The role of indispensability points towards a standard of likelihood of effects similar to refusal to supply. However, as also discussed above, the ultimate adoption of the standard of the capability to produce effects lowers the threshold of effects considerably.[896] As such, margin squeeze is likely to operate as rebates, with the only possibility for the dominant undertaking being its objective justification.

Finally, the abuse of selective pricing has also been subject to an effects-based test of indirect harm in *Post Danmark*. The Court again quotes the standard of exclusion used in rebates, followed in this instance by the test of predatory pricing.[897] However, the Court notes that 'it could not be established that [the dominant undertaking] had deliberately sought to drive out that competitor'.[898] The Court's opening statement that Article 102 does not 'seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market' must therefore be limited to indirect harm.[899] As such, the Court examines indirect harm by applying the costs levels of predatory pricing but focusing on their effects on an as-efficient competitor.[900] In relation to prices above average total costs, the Court considers that they cannot have an anti-competitive effect, which is coherent with the fact that they have only been considered abusive in *Compagnie Maritime Belge* as a credible plan to harm a competitor.[901] As for prices between average total costs and average incremental costs, the Court is reluctant to deny the possibility of exclusionary effects but states that 'as a

[891] See *TeliaSonera* (fn. 69) 28, citing Case C-280/08 P *Deutsche Telekom* [2010] ECR I-9555 (where the standard was first transposed from rebates to margin squeeze).
[892] See *TeliaSonera* (fn. 69) 32.
[893] See *TeliaSonera* (fn. 69) 73.
[894] *TeliaSonera* (fn. 69) 74.
[895] See *TeliaSonera* (fn. 69) 70-71.
[896] See *TeliaSonera* (fn. 69) 64.
[897] See *Post Danmark* (fn. 138) 26.
[898] *Post Danmark* (fn. 138) 27-29.
[899] See *Post Danmark* (fn. 138) 21.
[900] In this regard, the consideration that discrimination is not in itself abusive is valid for both direct and indirect harm, see *Post Danmark* (fn. 138) 30.
[901] See *Post Danmark* (fn. 138) 36.

general rule' an as-efficient competitor will be able to withstand them, which again indicates that their abusive character depends on the intent to harm competitors found in *France Télécom*.[902] The Court does not consider prices below average variable costs.

5. Abuses of market integration

This section will deal with abuses of market integration, which start from intent considered objectionable under the principle of market integration. Abuses of market integration illustrate the importance of EU competition law principles, as specific abuses are adjusted to fit concerns of market integration. It was already held above that market integration was the main explanation for *Continental Can*, regardless of subsequent developments in merger control, since the acquisition of another undertaking by the dominant undertaking does not appear to be normatively relevant for competition on the merits. Some instances of exploitative abuses appear to have also been influenced by market integration concerns, for example the discriminatory prices found in *United Brands*. In any event, the case law on market integration abuses, like direct harm abuses, is intent-based and applies irrespective of effects. National discrimination is subject to an intent-based standard which takes into consideration factors that are valued or decisive under other abuses, as seen in *Portuguese Airports* (i). Moreover, the case law has stated the rule that aiming to restrict parallel trade is automatically considered abusive, as *United Brands* and *Sot. Lélos kai* demonstrate (ii).

i. The standard of national discrimination

Portuguese Airports concerned national discrimination, which clearly raises concerns under the principle of market integration. The dominant undertaking was a public undertaking that managed airports, and the abuse was granting quantity discounts for the use of such airports that only benefited national airliners. As noted above in relation to indirect harm, the Court has instituted a rule in *Hoffman-La Roche* that quantity rebates are not abusive. In *Portuguese Airports*, however, the Court inquired as to

[902] See *Post Danmark* (fn. 138) 37-38. The Court therefore leaves this issue for the national court to determine, but points to the factual indications that the competitor at issue has managed to thrive despite these prices by the dominant undertaking, see *Post Danmark* (fn. 138) 39.

whether such rebates could lead to discrimination.[903] The answer, as the Court was forced to admit, was that benefiting large purchasers was 'the very essence of quantity discounts' and that this could not lead to abuse.[904] Nonetheless, the Court stated that the rebates must be 'justified by the volume of business they bring or by any economies of scale'.[905] This might seem like an effects-based test but, as the Court stated in the next paragraph, it is the application of an objective justification. Therefore, it was still necessary to find an abuse, which the Court based on the rebate only applying to 'a few particularly large partners' due to its 'absence of linear progression'.[906] It is unlikely that quantity rebates are in general subject to these conditions, which have made no appearance in the case law on indirect harm. The real issue, as the Court concludes, was that 'the system of discounts appears to favour certain airlines, in this case de facto the national airlines'.[907] As such, the intent to favour own nationals was subject to a standard, which included factors, such as the progression of a quantity rebate, that are usually not abusive.

ii. The rule on preventing parallel trade

United Brands dealt with another concern of market integration, preventing parallel trade. The first abuse at issue in *United Brands* involved contractual clauses prohibiting the resale of green bananas by distributors which, due to the perishable nature of bananas, prevented distributors from exporting them.[908] The Court interprets the contractual obligations and concludes that they had the intent to confine distributors to national markets.[909] This is enough to establish an abuse, the Court then considering the justification advanced by the dominant undertaking that its purpose was to guarantee product quality, by ensuring that bananas ripened properly and arrived in the market at the right moment.[910] This is a true objective justification, since the Court admits the

[903] See Case C-163/99 *Portuguese Airports* [2001] ECR I-2613 50.
[904] *Portuguese Airports* (fn. 903) 51.
[905] *Portuguese Airports* (fn. 903) 52.
[906] *Portuguese Airports* (fn. 903) 53.
[907] *Portuguese Airports* (fn. 903) 56.
[908] As the Commission stated, such clauses had 'a similar effect as a prohibition of exports', see *United Brands* (fn. 16) 135.
[909] See *United Brands* (fn. 16) 160.
[910] See *United Brands* (fn. 16) 142.

purpose and controls the proportionality of effects.[911] Hence, the Court first states that 'it is commendable and lawful to pursue a policy of quality', confirming that the dominant undertaking did so.[912] Then the Court adds that the policy must 'not raise obstacles, the effect of which goes beyond the objective to be attained'.[913] As such, when it concludes that the policy had the effect of 'limit[ing] markets to the prejudice of consumers and affect[ing] trade between Member States', the Court rejects that pursuing this policy should have the effect of isolating the national markets.[914] Although it was clear in *United Brands* that the abuse was in the intent to prevent parallel trade, further case law was necessary to establish it as a rule.

Sot. Lélos kai confirms the rule that the intent to prevent parallel trade is prohibited, already mentioned in Chapter IV (on restrictions of competition), so that the only possibility for the dominant undertaking is to plead an objective justification. At issue in *Sot. Lélos kai* was the refusal by the dominant undertaking to meet the orders of its distributors so as to prevent them from engaging in parallel trade. In the Opinion in *Sot. Lélos kai*, AG Colomer stated that it was 'evident that the intention of [the dominant undertaking] is contrary to the objectives of the Treaty', having no 'economic motive other than the elimination of parallel trade'.[915] The Court starts by quoting *Commercial Solvents* and *United Brands* to assert a refusal 'to meet the orders of an existing customer constitutes an abuse […] where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor'.[916] This is a somewhat liberal reinterpretation of these judgments, since none mention the effect of eliminating a competitor, but only the intent to do so. In fact, *United Brands* establishes a test for exploitative refusals to supply (in relation to distributors, not competitors) that a dominant undertaking 'cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary'.[917]

In any event, the Court does not pursue the issue of direct harm further, focusing instead on the intent to restrict parallel trade. First, it establishes that this was the intent of the

[911] It was mentioned above that justifications which are alternative interpretations of intent, such as the 'economic justification' other than harming a competitor for below-cost prices in predation, are part of the test of abuse and therefore are not generally applicable objective justifications.
[912] *United Brands* (fn. 16) 158-159.
[913] *United Brands* (fn. 16) 158.
[914] *United Brands* (fn. 16) 159.
[915] Opinion *Sot. Lélos kai* (fn. 344) 53-54. AG Colomer argues nevertheless that this should not be considered a *per se* abuse, framing intent as an 'aggravating circumstance', which as seen below the Court did not follow.
[916] *Sot. Lélos kai* (fn. 344) 34.
[917] *United Brands* (fn. 16) 182, quoted in *Sot. Lélos kai* (fn. 344) 49.

dominant undertaking by refusing to meet the orders of its distributors.[918] Second, it frames this intent under the following general rule:

> '[i]n respect of sectors other than that of pharmaceutical products, the Court has held that a practice by which an undertaking aims to restrict parallel trade in the products that it puts on the market constitutes an abuse of that dominant position'.[919]

As a demonstration of the automatic application of this rule, the Court refuses to consider the factor, pleaded by the dominant undertaking, that the parallel trade had a minimum impact on the final consumers.[920] Therefore, the dominant undertaking could only plead the objective justification of protecting its commercial interests.[921] In this regard, it pointed to the State regulation of the pharmaceutical market, which imposed on the dominant undertaking both fixed prices and distribution obligations. This made the dominant undertaking's only available defence against parallel trade 'not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level', which the Court acknowledged as a legitimate concern.[922]

Admitting that there was a legitimate purpose, the Court then establishes a criterion for the dominant undertaking to 'take steps that are reasonable and in proportion to the need to protect its own commercial interest'.[923] This represents the proportionality judgment to which objective justifications are subject to. It has also been described above that exploitative abuses are grounded on the principle of proportionality. This allows the Court to creatively borrow from the test established in *United Brands* for exploitative refusals to supply, and set the criterion for a proportionate protection of commercial interests at 'whether the orders of the wholesalers are out of the ordinary'.[924] In order to apply this criterion, the Court indicates 'the size of those orders in relation to the requirements of the market […] and the previous business relations between that undertaking and the wholesalers concerned'.[925]

---

[918] See *Sot. Lélos kai* (fn. 344) 36.
[919] *Sot. Lélos kai* (fn. 344) 37. The Court adds 'particularly when such a practice has the effect of curbing parallel imports by neutralising the more favourable level of prices which may apply in other sales areas in the Community […] or when it aims to create barriers to re-importations which come into competition with the distribution network of that undertaking'. Rather than additional tests, however, these are situations from where the intent to prevent parallel imports can be objectively interpreted.
[920] See *Sot. Lélos kai* (fn. 344) 52-57.
[921] See *Sot. Lélos kai* (fn. 344) 50.
[922] *Sot. Lélos kai* (fn. 344) 68.
[923] *Sot. Lélos kai* (fn. 344) 69.
[924] *Sot. Lélos kai* (fn. 344) 70. In *United Brands* the Court did not examine whether the orders were out of the ordinary, since the dominant undertaking failed to showing that it was actually trying to protect its commercial interests.
[925] *Sot. Lélos kai* (fn. 344) 77.

6. Case law table

Abuses of dominance as methods different from normal competition				
Intent	**Tests of specific abuses**			
	Intent-based		Effects-based	
	Rules	Standard	Rules	Standard
To harm competitors (Principle of competition on the merits)	*France Télécom* (prices below average variable costs) *TeliaSonera* (margin squeeze in related markets)	*Commercial Solvents* (existing customer) *Compagnie Maritime Belge* (selective prices) *AstraZeneca* (misuse of intellectual property) *France Télécom* (prices below average total costs)		
To strengthen market power (Principle of competition on the merits)	*Hoffman-La Roche* (exclusivity and loyalty rebates) *Tomra* (loyalty rebates)		*British Airways* (individual and general retroactive rebates) *IMS* (indispensability and eliminating all competition) *TeliaSonera* (indispensability and loss leading)	*British Airways Tomra* (target retroactive rebates) *TeliaSonera* (reduced profitability)
To prevent market integration (Principle of market integration)	*United Brands* (contractual impediments) *Sot. Lélos kai* (refusal to supply)	*Portuguese Airports* (non-progressive rebates)		

7. Conclusion

Behind the simplicity of the two conditions of Article 102 – dominant position and abuse – hides a system which continues to challenge doctrinal explanations and case law categorisation. The typology of abuses established by the Court has eased this difficulty, allowing authors to focus their discussion on particular tests. Nevertheless, the path for arriving at these tests has not received sufficient attention. Under Article 101 it is only necessary to establish one of the forms of collusion mentioned there, as seen in Chapter III (on collusion), judging intent according to the principle of independence of economic action. Under Article 102, the 'special responsibility' of a dominant undertaking makes it subject to multiple duties according to several principles. While 'normal competition' provides a normative indication which is relatively easy to follow in relation to the paradigm of a competitive markets, 'methods different from normal competition' are varied: exclusionary, exploitative and market integration abuses are all considered to deviate from that paradigm. Therefore, the notion of abuse starts by a judgment of intent according to, respectively, the principles of proportionality, of competition on the merits and of market integration.

An 'effects-based approach' has also been argued under Article 102 relying on a typology of abuses, overlooking that such an approach was attempted by the Court in relation to notion of abuse in *Continental Can*. By holding in *Continental Can* that any measure that has the effect of strengthening a dominant position can be considered abusive, the Court drew a wide 'jurisdictional' concept which allowed any behaviour to be caught and its effects considered. The replacement of this 'jurisdictional' concept by the principle of competition on the merits shows the difficulties of an 'effects-based approach'. Temple Lang comments that 'economists sometimes seem to forget that a policy cannot be based on "economic effects" unless there is a test for distinguishing effects due to legitimate competition from effects due to exclusionary conduct'.[926] A wide 'jurisdictional' concept foregoes such a test, which may otherwise be provided under specific abuses.

It is the principle of competition on the merits that does so in relation to exclusionary abuses. With this principle operating in the background, an 'effects-based approach' has concentrated in arguing that every test of specific abuse should incorporate effects.

[926] Temple Lang (2012) 153, arguing that this should be the effects mentioned in the letter of Article 102(b) (which, admittedly, does not correspond to the case law). See also Eilmansberger (2005) 149-150.

Nonetheless, it has also been unsuccessful there, with more serious consequences. Seemingly attempting to incorporate an 'effects-based approach', the General Court has applied tests of effects under the standard of the capability to produce them, which corresponds not to the likelihood of anti-competitive effects but to implementation of intent. At the origin of this is the confusion between the underlying premises of restrictions by object and effect, but the General Court has managed nonetheless to influence the case law of the Court. In *Tomra* the Court stated that an abuse could be found on either the likelihood or the capability to produce effects. The capability to produce effects is presumed from the definition of the abusive behaviour, so this is unlikely to satisfy an 'effects-based approach'. Moreover, intent-based abuses are likely to be confused with low-threshold effects-based ones. There is hope, however, that the Court will apply the alternative in *Tomra* along the lines of the two different tests.

Exclusionary abuses can be divided into direct harm and indirect harm, with the first being subject to a test of intent and the second to both intent and effects-based tests. An 'effects-based approach' has argued that margin squeeze (which involves both direct and indirect harm) and predatory pricing should be subject solely to a test of effects. However, there is good reason to believe that the current intent-based tests are correct. These are credible strategies to harm competitors, warranting a presumption of intent and benefiting from the legal certainty of rules. It is more doubtful whether they are equally credible strategies to strengthen market power, particularly if margin squeeze is defined as widely as reduced profitability. The Enforcement Guidance on Article 102 has taken nevertheless this route, demanding likely foreclosure in predatory pricing and indispensability for margin squeeze.[927] Even if this is adopted by the Court, these strategies will continue to be covered by the standard of direct harm to competitors.

As for indirect harm, one can observe that the Court has moved away from the intent-based rules instituted in *Hoffman-La Roche* to several effects-based rules and standards. This leads to the question of whether the intent-based rules on exclusivity and loyalty rebates are still adequate. That question cannot be answered by the likelihood of anti-competitive effects, since they do not aim to capture such effects. It must instead be analysed, first, if the presumption of the intent to strengthen market power is adequate, and second, whether these strategies should be censored in themselves. The presumption does not appear to be a problem, since are usually offered to with the purpose to retain customers; the main issue is whether they should be considered anti-

[927] Enforcement Guidance on Article 102 63 and 81.

competitive. It is relevant to note that the Court chose not to institute similar rules for other strategies where such intent could have easily been presumed, such as the refusal to supply an indispensable input or margin squeeze leading to sales at loss. This signals a more nuanced view that, just because a method does not correspond to the paradigm of competition on the merits, it should not automatically be considered unavailable to dominant undertakings.

It is argued that indirect harm abuses should be limited to effects-based tests. This is not just a question of the coherence of the case law, or of its evolution according to an 'effects-based approach'. Contrary to direct harm, exclusivity and loyalty rebates are not accompanied by an intent-based standard in relation to rebates.[928] In other words, the intent to strengthen market power has not been considered abusive in itself in a relevant number of situations which deserve their formalisation into rules. On the contrary, the standard which has been consistently quoted in relation to pricing abuses is effects-based. Therefore, intent should only be used to signal the situations which potentially depart from competition on the merits, leaving their final assessment to whether they cause anti-competitive effects. Exclusivity and loyalty rebates in *Hoffman-La Roche* could be reinterpreted as effects-based rules, namely the presumptions of effects stated in *British Airways* and *Tomra*.[929] This is preferable to mixing intent and effects and only requiring the capability to produce effects.

[928] A standard was applied for tying in *Tetra Pak* (fn. 702) 35-37, taking into consideration the relationship between the products and aftermarkets, but it is unclear whether it concerned direct harm, as part of a strategy to harm competitors, or indirect harm.

[929] In GC *Michelin* (fn. 753) 60 the General Court even preferred an effects analysis to such rules, by investigating a rebate system which it qualified as quantitative and therefore, under the case law of the Court, should have been considered as not being abusive.

CONCLUSION

The present research set out to establish the substantive value of intent in the case law applying Articles 101 and 102, which was otherwise overlooked by the doctrinal emphasis on effects. A theoretical framework was outlined, whereby intent was defined based on the actions of undertakings as rational agents, as described in Chapter I (on the concept of intent), and intent was recognised an autonomous normative value which allows moral judgments, as discussed in Chapter II (on judging intent). The case law on Articles 101 and 102 was then analysed according to this framework, proving the descriptive claim that intent is judged according to the principles of independence of economic action, of market integration, and of competition on the merits. In Chapter III (on collusion), the notion of collusion was seen to be based on intent, namely how influence over such intent is judged according to the principle of independent economic action. In Chapter IV (on restrictions of competition), restrictions by object were found to involve a moral judgment of intent in its context, either continuing the 'pre-substantive' analysis of collusion or making a fresh judgment. Finally, in Chapter V (on abuse of dominance), abuses were also seen to involve a two-step application, first by identifying methods different from normal competition based on the judgment of intent according to several principles, and subsequently applying a test of intent or effects of specific abuses. The substantive value of intent having been confirmed, this Conclusion will attempt to summarily expand the normative claim made in Chapter II (on judging intent) – that intent is necessary for the coherence and stability of the case law – into inferences for the wider character of EU competition law.

Such inferences for the character of EU competition law require taking into account certain aspects which were only covered indirectly by the present research: the normative value of effects and the role of the Commission. In relation to first, it was acknowledged that effects have a normative value derived from a consequentialist view of the goals of EU competition law, to which intent often plays as subordinate role. The substantive value of effects enables the definition of the relevant market, allows finding restrictions by effect, permits the granting of exemptions under Article 101(3), grounds the application of an effects-based test of abuse, regulates the assessment of concentrations under the Merger Regulation, and contributes to the application of

objective justifications. In relation to the second, the present research did not cover the decisional practice of the Commission. However, at every step of this research the Commission has been the source of, and provided support for, an 'effects-based approach'. Authors accept the notion of restrictions by object as a presumption of anti-competitive effects advanced by the Commission post-'modernisation'. An 'effects-based approach' is also argued by the doctrine for abuse of dominance relying on the standard of anti-competitive foreclosure stated by the Commission in its Enforcement Guidance on Article 102. An administrative agency like the Commission is 'designed to achieve the kinds of goals which competition law seeks to attain', as Monti comments, and according to institutional theory it is also best placed to assess effects for that purpose.[930] It suggested that the doctrinal 'effects-based approach' is the result of the considering of EU competition law from the perspective of – and, as noted in Chapter II (on judging intent), an effort to influence – the Commission.

The main inference that can be drawn from the present research is that there are two sides to EU competition law: the one investigated, which is judicial, grounded on principles, and intent-based, and another side, which is administrative, policy orientated and effects-based. The two sides view Articles 101 and 102 differently. This research made no pretence that EU competition law should be exclusively based on the normative value of intent, and the Courts of the EU are equally tasked of judging on the issues where effect has normative value. An 'effects based approach', on the contrary, does not recognise any other perspective but its own policy orientation. This insistence is programmatic and well-intentioned, but short-sighted. From a legal interpretation perspective, it does not help to comprehend or anticipate the full extent of the case law of the Court. From a philosophical point of view, it assumes an answer to age old questions which remain unsettled. Limiting EU competition law to consequentialism isolates the phenomenon of competition from a richer historical, social and intellectual background. In contrast, the normative claim advanced in Chapter II (on judging intent) that the use of intent could lead to a 'reflective equilibrium' between competitive intuitions and moral reasoning attempted a consensus of all moral views, including consequentialism. That consensus is based on the paradigm of competitive markets, which always allows undertakings to unintentionally influence market conditions and harm competitors by 'winning' the competitive game. Even if this negative scope is less visible than the instances where Articles 101 and 102 are applied, such as the effects-

[930] Monti (2007) 5.

based examples given above, it shows that the foundation of EU competition law lies with judgments of intent.

There is no guarantee, however, that EU competition law will not adopt a full 'effects-based approach' in the future. Commission practice and doctrinal push cannot but have their effects on the case law. The present research has shown the General Court to be particularly sensitive to these influences, going as far as making significant effects-based pronouncements unsupported by the case law of the Court. Even the case law of the Court has shown novel elements which can develop towards fundamental changes. The reference in *Allianz Hungária* to the likelihood of anti-competitive effects could eliminate the distinction between restrictions by object and effect that can be traced back to *Consten and Grundig*. If both notions of restriction are based on anti-competitive effects, this might cause the notion of collusion to change into a 'jurisdictional' concept capturing any behaviour which can lead to those effects. The statement in *Post Danmark* that competition on the merits does not prevent the exclusion of inefficient competitors, although currently conditioned by the facts of that case, could be developed to eliminate abuses of direct harm to competitors. Although this might seem to limit the scope of abuse of dominance, it can move the principle of competition on the merits towards sole efficiency concerns, which would weaken its intuitive constraint. If so, abuse will come to signify any exclusion assessed as inefficient – much in the way as *Continental Can* defined abuse as any strengthening of market power before being limited by competition on the merits.

It was seen throughout this research that advocates of an 'effects-based approach' hold such moves to be beneficial, namely by eliminating 'formalistic' constraints on achieving the outcomes prescribed by the goals of EU competition law. These authors can point to the consequences of *Continental Can*: although concentrations did not appear to be contrary to competition on the merits, concentrations are now subject to the scrutiny of the Commission under the Merger Regulation. This evolution appears to have been generally welcomed by all actors, and could indicate that similar moves would be equally well received. A brief detour into the debate over the regulatory character of EU competition law illustrates this. There is an overlap between the effects-based side of EU competition law and regulation, namely the administrative-technocratic enforcement and the mandate of 'best' solutions.[931] Authors readily admit

[931] See Dunne (2014) 415-433. Other characteristics of regulation mentioned by Dunne, namely *ex ante* enforcement, prescriptive doctrines and regulatory remedies are not as relevant, since consequentialism is concerned about outcomes, not particular ways to achieve them.

that EU competition law is (at least partially) regulatory.[932] However, due to following an 'effects-based approach', it becomes difficult for those authors to place limits on such regulatory character.[933] In this regard, Ibáñez Colomo warns that EU competition law risks being 'instrumentalised to meet the objectives of sector-specific regimes', defined as the Commission departing from what could be expected under existing precedent.[934] Nonetheless, such a move would be coherent within the usual debate over the goals of EU competition law and how to best achieve them. Dunne states that 'the policy choice to incorporate such regulatory components might be defended on the basis that this provides a practicable means by which to address market problems that comprise the core concern of antitrust'.[935] For an 'effects-based approach', that is the beginning and the end of the debate.

Perhaps a better perspective can be gained by stepping outside the terms set by an 'effects-based approach' itself, and considering some of the traditional arguments levelled against consequentialism. The first, Anscombe's original critique when coining the expression, is that consequentialism does not rule out anything in advance of deliberating how to reach an outcome.[936] Naturally, EU competition law is not as unconstrained as the field of philosophical possibility, so an 'effects-based approach' will always be limited existing legal provisions and external constraints, notably fundamental rights. The regulatory character of competition law has also been said to be limited by external constraints.[937] Nonetheless, if a full 'effects-based approach' were adopted, EU competition law would not be internally limited in distinguishing between behaviour with the same consequences. As such, regardless of external constraints, parallel behaviour would be considered the same as a cartel; direct harm to competitors the same as indirect one through competition on the merits; and the acquisition of market power by merger the same as internal growth or market success.

The second traditional critique is that, as consequentialism dispenses with intent, it can also dispense with agenthood. If the purpose is to achieve a certain outcome, it should not be dependent on being triggered by action. This is illustrated by wide 'jurisdictional' concepts, such as the limitation of contractual freedom employed by the

[932] See Dunne (2014) 434, Ibáñez Colomo (2010) 263-264 and Monti (2007) 243.
[933] Temple Lang (2012) 150 argues that this regulatory character results from an 'effects-based approach', since it promotes *ad hoc* decisions on the best market outcome.
[934] Ibáñez Colomo (2010) 277.
[935] Dunne (2014) 435 and 440-441, referring to commitment decisions under Article 9 of Regulation 1/2003, and also offering as counterpoint errors in achieving the desired outcomes.
[936] See Teichmann (2008) 114.
[937] Thus, for example, Dunne (2014) 436-437 refers the separation of powers and the rule of law, and Ibáñez Colomo (2010) 306 refers to procedural guarantees.

Commission pre-'modernisation' (which can be said to have been adopted to promote the goal of market integration), the reduction of uncertainty proposed by Odudu discussed in Chapter III (on collusion), or the increase of market power in *Continental Can*. Under an 'effects-based approach', meaningful action is discarded in order to simply capture any situation where effects are possible. However, if the characteristics of the action are substantively irrelevant, then the action itself soon is. Thus, regulation usually covers all market subjects, and does require specific actions to be triggered. If a full 'effects-based approach' were adopted, wide 'jurisdictional' interpretations would eventually dispense with the collusion and unilateral action required by the letter of Articles 101 and 102.

Finally, it is traditionally accepted in the formulations of consequentialism that agents are not in the best position to assess consequences.[938] This should done by an external observer, which has been recognised in moral philosophy to easily stray into elitism, since only a few observers can be said to be in a position to do so effectively. Somewhat mirroring this, not only has an 'effects-based approach' focused on the role of the Commission, but the process of 'modernisation' itself can be characterised a unilateral re-definition of the balance of the goals of EU competition law. Nevertheless, it is a short step from assessing the relevant effects to balancing such effects if both operations rely on the same normative value and technical expertise. If a full 'effects-based approach' were followed to its logical consequence, the Court should defer not only to the expertise of the Commission in 'complex economic assessments', as it currently does, but also in complex balancing exercises of different goals. The role of judicial review would then be confined to procedural irregularities and external constraints.

Of course, none of described arguments have proven decisive in rejecting consequentialism in moral philosophy, and equally good ones have been made on its side which are not mentioned here. As set out in the introduction to this research, the purpose is not to settle any such controversy, nor to make any conclusion depend on it. The purpose is merely to illustrate some possible developments if EU competition law moves toward relying solely on the normative value of effects, once the intuitive and moral constraints posed by intent are removed. As already stated, it may be that a full 'effects-based approach' will succeed in doing so, but EU competition law will no longer resemble what it is today.

[938] Sinnott-Armstrong (2014) Section 4.

BIBLIOGRAPHY

Alexander L. and Moore M. (2012) Deontological Ethics. Zalta E. N. (ed.) *The Stanford Encyclopedia of Philosophy*. Available at:

http://plato.stanford.edu/archives/win2012/entries/ethics-deontological/

Anscombe G. E. M. (1963) *Intention*. 2nd ed. Blackwell

Akman P. (2014) The role of intent in the EU case law on abuse of dominance. 39 *E.L.Rev.* 316

Ashworth A. (2009) *Principles of Criminal Law*. 6th ed. Oxford University Press

Bailey D. (2012) Restrictions of competition by object under Article 101 TFEU. 49 *CMLRev* 559

Barnard C. (2010) *The Substantive Law of the European Union*. 3rd ed. Oxford University Press

Bavasso A. (2005) The role of intent under Article 82 EC: From "flushing the turkeys" to "spotting lionesses in regent's park". 26(11) *ECLR* 616

Black O. (2008) Agreements, concurrence of wills or offer and acceptance. 4 *E.L.Rev.* 103

Blair R. D. and Sokol D. D. (2012) The rule of reason and the goals of antitrust: An economic approach. 2 *Antitrust Law Journal* 471

Bork R. H. (1993) *The Antitrust Paradox*. 2nd ed. Free Press

Chalmers D., Davies G. and Monti G. (2010) *European Union Law: Cases and Materials*. 2nd ed. Cambridge University Press

Clark A. (1994) Beliefs and desires incorporated, 91(8) *The Journal of Philosophy* 404

Dennet D. (1989) *The Intentional Stance*. MIT Press

Dennet D. (1993) *Consciousness Explained*. Penguin

Dennet D. (2009) *Intentional Systems Theory*. Available at:

http://ase.tufts.edu/cogstud/dennett/papers/intentionalsystems.pdf

Driessen-Reilly M. (2003) Don't shoot the messenger: a look at Community law relating to harassment in the workplace. 28 *E.L.Rev.* 494

Dunne N. (2014) Commitment decisions in EU competition law. 10 *Journal of Competition Law & Economics* 399

Dworkin R. (1967) The model of rules. *Faculty Scholarship Series*. Paper 3609. Available at:

http://digitalcommons.law.yale.edu/fss_papers/3609

Dworkin R. (1998) *Law's Empire*. 7th ed. Hart

Dworkin R. (2006) *Justice in Robes*. Harvard University Press

Dworkin R. (2011) *Justice for Hedgehogs*. Harvard University Press

Edmonds D. (2014) *Would You Kill the Fat Man? The Trolley Problem and What Your Answer Tells Us about Right or Wrong*. Princeton University Press

Eilmansberger T. (2005) How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anticompetitive abuses. 42 *CMLRev* 171

Evans D. S. and Hylton K. N. (2008) The lawful acquisition and exercise of monopoly power and its implications for the objectives of antitrust. 4 *Competition Policy International* 203. Available at:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275431

Freeman S. (2007) *Rawls*. Routledge

Gerber D. J. (2007) The future of Article 82: Dissecting the conflict. Ehlermann C.-D. and Marquis M. (eds.) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* Hart 37

Gormsen L. L. (2010) *A Principled Approach to Abuse of Dominance in European Competition Law*. Cambridge University Press

Gormsen L. L. (2013) Are anti-competitive effects necessary for an analysis under Article 102 TFEU? 36 *World Competition* 223

Hauser M. D. (2006) *Moral Minds*. Abacus

Hayek F.A. (2002) Competition as a discovery procedure. Snow M. S. (tr.) 5 *The Quarterly Journal of Austrian Economics* 9

Hursthouse R. (2013) Virtue Ethics. Zalta E. N. (ed.) *The Stanford Encyclopedia of Philosophy*. Available at:

http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/

Hutto D. D. (2008) *Folk Psychological Narratives*. MIT Press

Ibáñez Colomo P. (2010) On the application of competition law as regulation: Elements for a theory. Eeckhout P. and Tridimas T. (eds.) *Yearbook of European Law 2010* Oxford University Press 263

Ibáñez Colomo P. (2012) Market failures, transaction costs and article 101(1) TFEU case law. 37 *E.L.Rev.* 541

Jones A. and Sufrin B. (2014) *EU Competition Law*. 5th ed. Oxford University Press

Kaplow L. (1992) Rules versus standards: An economic analysis. 42 *Duke Law Journal* 557

Korah V. (2011) Guidance on the Commission's Enforcement Priorities in applying Article 82 to Abusive Exclusionary Conduct by Dominant Undertakings: from protecting freedom to enter a market to an efficient allocation of resources to increase

consumer welfare. Pace L. F. (ed.) *European Competition Law: The Impact of the Commission's Guidance on Article 102* Elgar 8

Lianos I. (2008) Collusion in vertical relations under Article 81. 45 *CMLRev* 1027

Lianos I. (2009) Categorical Thinking in Competition Law and the 'Effects-based' Approach in Article 82 EC. Ezrachi A. (ed.) *Article 82 EC – Reflections on its Recent evolution*. Hart 19

Lianos I. (2013) Some reflections on the question of the goals of EU competition law. *CLES Working Paper Series*. Available at:

http://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-3-2013

Malle B. F. and Knobe J. (1997) The folk concept of intentionality. 33 *Journal of Experimental Social Psychology* 101

McIntyre, Alison (2011) Doctrine of Double Effect. Zalta E. N. (ed.) *The Stanford Encyclopedia of Philosophy*. Available at:

http://plato.stanford.edu/archives/fall2011/entries/double-effect/

Melícias M. J. (2012) The use and abuse of intent evidence in antitrust analysis. 33(4) *World Competition* 569

Mestmäcker E.-J. (2011) The development of German and European competition law with special reference to the EU Commission's Article 82 Guidance of 2008. Pace L. F. (ed.) *European Competition Law: The Impact of the Commission's Guidance on Article 102* Elgar 25

Mikhail J. (2011) *Element of Moral Cognition*. Cambridge University Press

Monti G. (2007) *EC Competition Law*. Cambridge University Press

Monti G. (2013) Restraints on selective distribution agreements. 36 *World Competition* 489

Motta M. (2007) *Competition Policy: Theory and Practice*. 7th ed. Cambridge University Press

Nagy C. I. (2013) The distinction between anti-competitive object and effect after Allianz: The end of coherence in competition analysis? 36 *World Competition* 541

Nazzini R. (2011) *The Objectives and Principles of Article 102*. Oxford University Press

Odudu O. (2001) Interpreting Article 81(1): object as subjective intent. 26 *E.L.Rev.* 60

Odudu O. (2006) *The Boundaries of EC Competition Law: The Scope of Article 81*. Oxford University Press

Odudu O. (2009) Restrictions of competition by object: what's the beef? 9 *Competition Law Journal* 11

Odudu O. (2010) The wider concerns of competition law. 30 *Oxford Journal of Legal Studies* 599

O'Donoghue R. and Padilla A. J. (2013) *The Law and Economics of Article 102 TFEU*. 2nd ed. Hart

Page W. H. (2013) Objective and subjective theories of concerted action. 79 *Antitrust Law Journal* 2015

Posner R. (1990) Law and economics is moral. 24 *Valparaiso University Law Review* 163

Posner R. (2001) *Antitrust Law*. 2nd ed. Chicago University Press

Posner R. (2010) *How Judges Think*. Harvard University Press

Rawls J. (1999) *A Theory of Justice*. Harvard University Press

Rojac P. and Lynskey O. (2014) Schenker; expert legal advice cannot be relied upon to exempt an undertaking from competition law sanctions. 5 *Journal of European Competition Law & Practice* 27

Singer P. (2005) Ethics and intuitions. 9 *The Journal of Ethics* 331

Sinnott-Armstrong W. (2014) Consequentialism. Zalta E. N. (ed.) *The Stanford Encyclopedia of Philosophy*. Available at:

http://plato.stanford.edu/archives/spr2014/entries/consequentialism

Souto Soubrier L. F. (2007) The concept of an agreement and beyond: How to block parallel imports of pharmaceuticals to protect the heart of competition. Amato G. and Ehlermann C.-D. (eds.) *EC Competition Law: A Critical Assessment*, Hart 81

Speaks J. (2004) *A guide to Anscombe's Intention*. Available at:

http://www3.nd.edu/~jspeaks/courses/mcgill/519-action/anscombe-1-31.pdf

Stucke M. E. (2006) Morality and antitrust. 3 *Columbia Business Law Review* 443

Stucke M. E. (2012) Is intent relevant? 8(4) *Journal of Law, Economics & Policy* 801

Teichmann R. (2008) *The Philosophy of Elizabeth Anscombe*. Oxford University Press

Temple Lang J. (2012) How can the problems of exclusionary abuses under Article 102 TFEU be resolved? 37 *E.L.Rev.* 136

Townley C. (2009) *Article 81 EC and Public Policy*. Hart

Whelam P. (2013) Cartel criminalization and the challenge of 'moral wrongfulness'. 33 *Oxford Journal of Legal Studies* 535

Whish R. and Bailey D. (2012) *Competition Law*. 7th ed. Oxford University Press

Wilson W. (2011) *Criminal Law*. 4th ed. Longman